ONE TRIAL COURT:

POSSIBILITIES *and* LIMITATIONS

Carl Baar

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and
LIMITATIONS

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Chapter One

Introduction: Origins and Purposes of the Study

We see the courts, pre-eminently among our public institutions, as steeped in tradition and conservatism. This view reflects our understanding of an institution that predates our own political system, and whose form and appearance reflect its origins and development in medieval times. Courts characteristically display a set of formalized relationships, with distinctive titles, apparel, and physical settings that identify both the hierarchical relations among the participants and the common obligations that set them apart from the rest of the community.

Yet within the past 25 years, the ways our courts are organized have fundamentally changed. These changes in court organization contrast with the continuing appearance of stability and tradition. As a result, the public is largely unaware of how different our courts are from what they were a generation ago.

It is time to take stock of the changes the courts have undergone, and consider in light of that stocktaking a new generation of proposals that are emerging from governments, law reform bodies and members of the judiciary themselves.

The purpose of this study is to assess past and proposed changes in the structure of trial courts in Canada. Past changes have reduced the number of distinct trial courts, both by the merger of different levels of courts, and by the pulling together of courts at the same level. More recently, a few provinces have unified all jurisdiction in particular fields of law within a single provincial trial court. The label "unification" has come to refer to the general thrust of the current generation of structural reforms in Canadian trial courts.

In theory, a unified trial court is one in which all the judicial business of a province is handled by a single class of judge within a single trial court. In practice, the results of structural reform are much more diverse. Examination of jurisdictions which have moved earlier or further along the path to unification reveals a rich mixture of accomplishments and limitations, praise and problems. Fundamental change is coupled with the persistence of traditional practices that reform advocates had hoped to transcend. What has emerged is neither the utopia proponents promised nor the purgatory opponents feared. Instead, a new array of structural issues, coupled with a fresh set of demands from society, will provide the basis for the next generation of changes in the courts.

ORIGINS OF THE STUDY

This report had its origin in a request from the Administration of Justice Committee of the Canadian Judicial Council for suggestions about research that would be useful in assessing proposals to unify Canadian trial courts. At the time that request was made in March 1990, a number of events had placed the issue of a unified trial court at the centre of the policy agenda:

- The Attorney General of Ontario, then the Liberal Government's Ian Scott, had introduced a comprehensive court reorganization package in May 1989. The overall proposal was to merge the three existing trial court levels (the High Court of Justice, the District Court and the Provincial Court) into a single Ontario Court of Justice. Legislation tabled with the unification proposal would only enact "Phase One," the merger of the High Court and the District Court, a step already taken by a majority of the country's provinces. But Scott emphasized that "Phase Two," merging the two remaining levels, was government policy and would follow soon thereafter.

- Within a week of Scott's announcement, the Law Reform Commission of Canada released its Working Paper 59, Toward a Unified Criminal Court, endorsing the concept of a single court for the trial of criminal offences. The proposal to unify jurisdiction in criminal matters was the most controversial element of the Ontario court reorganization package. A few provinces had already unified jurisdiction in civil matters and in family matters, but no province had a unified criminal court. Now the federal Law Reform Commission was arguing for its adoption.

- At its August 1989 annual convention, the Canadian Bar Association agreed to establish a Court Reform Task Force, a national commission that would examine proposals for altering court structure. Chairing the commission was Justice Peter Seaton of the British Columbia Court of

Appeal. CBA members' concern about Ontario's Phase Two was instrumental in securing approval for creating the Task Force. By 1990, the Task Force had taken shape, and August 1991 was established as the date for completing its work.

- By early 1990, what many observers had labelled an Ontario initiative emerged with broader support. Scott had won the support of his counterparts from New Brunswick and British Columbia, and was lobbying other provincial Attorneys General to secure their endorsement for a joint resolution in favour of trial court unification. In June 1990, a national meeting of provincial ministers unanimously approved the principle of a unified trial court.

In February 1990, the Executive of the Canadian Judicial Council discussed these developments and considered what action if any would be appropriate. The subject was referred to the Council's Administration of Justice Committee as a matter of urgency, and the author of this report was asked for advice about appropriate research.

The resulting advice was premised on a view that the current debate on the advisability of various models of court structure has been dominated by theoretical arguments about what would and would not happen if the courts were unified. What was needed, therefore, was an empirical study that would provide a more adequate factual basis to assess the competing claims.

At the same time, any empirical research would face significant limitations. Systematic study of the relative merits of competing organizational designs is extremely difficult, especially when key characteristics are not easy to measure. Whether a unified trial court will enhance or reduce the quality of justice would be difficult to say; our ability to measure "quality" is too weak to assess systematically the performance of existing courts, let alone estimate the performance of a future court. Even with data on more readily measurable characteristics such as cost, efficiency and expeditiousness, it would be difficult to conclude that a unified trial court would be more or less costly, efficient or expeditious than its current counterparts.

Further reflection suggested that part of the factual basis on which unified trial courts could be evaluated might derive from less systematic but still broadly based research on how unified trial courts operate in practice. Research with this focus would have multiple uses. It could assist members of the Canadian Judicial Council and others in evaluating the merits and the workability of more unified trial courts. It could also provide information to Council members, all of whom are chief justices with administrative responsibilities, on how unified trial courts are administered. If governments were to enact legislation to unify trial courts, chief justices in the various provinces would be called upon to develop the administrative capacity necessary to operate a larger court.

From this reasoning emerged the conclusion that interviews and field work should be conducted in provinces that have had the most experience with merged and/or unified courts, and in relevant foreign jurisdictions. A survey of court systems outside Canada suggested that an examination of one-level trial courts in the United States would be most useful.

The Administration of Justice Committee recommended that the suggestions be developed into a full proposal. The Council requested additional funding, and a supplemental appropriation was authorized by the Treasury Board in June, so that the study could begin in the fall of 1990.

As the study proceeded, it became clear to committee members that the main impact of a proposal to unify the trial courts would be to unify the criminal trial courts. While no Canadian province had a unified criminal court to examine, it was possible to canvass the opinions and predictions of a variety of individuals in the course of the field work (particularly in Alberta and New Brunswick). It was also possible to examine how the criminal process operated in American unified trial courts. The author's earlier empirical research on the pace of criminal litigation in three Canadian provinces, and interviews conducted during August 1990 in London, England, regarding operation of the Crown Court could also be brought to bear.

Nevertheless, it is not a purpose of this study to make recommendations regarding the wisdom of unified trial courts in general or a unified criminal court in particular. The absence of recommendations does not however mean an absence of analysis, conclusions or criticism. Any empirical research involves a search for patterns that give meaning to the data. To the extent that patterns are visible, an effort will be made to articulate them. If the study is effective, readers will be able to draw their own conclusions. Even better, all sides in the current debate will be better informed, and perhaps better able to find common ground and to anticipate new issues in organizational design.

ORGANIZATION OF THE REPORT

Chapters Three through Seven constitute the core of the report, as they bring together descriptions of the three provinces and three states visited during the course of the field work, and analyses of the common patterns that characterize American trial court unification and Canadian reforms in court structure. Before this material begins, Chapter Two will set the stage by tracing the overall structural changes that have occurred in Canadian trial courts over the past generation.

Chapter Eight will examine the current operation of a dual system of criminal trial courts, focusing on issues and criticisms that are part of the debate on the unified criminal court. Finally, Chapter Nine will examine the historical and jurisprudential foundations of the concept of court unification, and link the history and theory to developments in Canada, the United States, Australia and England. What underlying shifts characterize these countries' approaches to court structure? What do the overall directions suggest for Canadian trial court policies and practices?

An annotated bibliography follows the text, and is organized by country and province/state for easier use. As a result, bibliographical references in the text give the author's name and identify the section of the bibliography in which the cited work may be found.

ACKNOWLEDGEMENTS

A project that involves extensive field work accumulates debts to many people. Judges, court officials and support staff, scholars and researchers in all three states and three provinces were exceptionally helpful. Chief Justices in the three states took time from their busy schedules to meet with me, and their senior court administrators provided assistance and hospitality that made the site visits a pleasure as well as an education. Similarly, colleagues and friends across Canada gave their time, ideas and aid in ways that can never be fully reflected in a formal report.

Throughout the research and preparation of the report, the members and staff of the Canadian Judicial Council provided a supportive environment for the work. Meetings of the Administration of Justice Committee were as stimulating as the best research seminar, and committee members' feedback on the draft report provided useful opportunity for improvements.

Despite all this help and support, the conclusions and interpretations in this report are my responsibility alone.

Chapter Two

The Context of Court Structural Reform

The current interest in changing the structure of our trial courts builds on the three major structural reforms of the past 25 years:

- Merger of superior courts with county and district courts, creating a single trial court of general and inherent jurisdiction in each province where they had previously been two separate and distinct trial courts.

- Transformation of local magistrate's courts, once the dispersed third level of trial courts often staffed by lay judges, into province-wide systems of trial courts with increasingly significant statutory jurisdiction.

- Creation in particular locations and particular provinces of unified family courts, with specialized jurisdiction in family law matters that had formerly been divided among different levels of trial courts.

These three developments are well known to participants in Canada's justice system, but it is worthwhile summarizing briefly their evolution and impact, and using this summary to grasp both the general trends and the distinctive responses visible across the country.

A QUARTER-CENTURY OF COURT REFORM

At the time these three changes first emerged in the 1960's, Canadian courts still reflected the structure contemplated by the framers of the 1867 Constitution Act. The "judicature" provisions of that Act, sections 96-101, contemplated a set of superior courts and a set of county or district courts in each province, with the judges of those provincially-administered courts appointed by the federal government (thus the commonly-used terminology "section 96 judge"). The superior courts at that time, and as new provinces entered confederation over the next 82 years, were central trial courts conceived on the model of the English High Court of Justice. Justices had both trial and appellate jurisdiction, and resided in one or perhaps two central locations in the province (from whence they also travelled on circuit from time to time) to deal with the major civil and criminal cases brought before them.

District or county courts were decentralized, especially in provinces where the population was more dispersed, as in Ontario, New Brunswick or Nova Scotia. County court judges were the local resident judges, with a variety of civil, criminal and even nonjudicial responsibilities. County or district judges traditionally presided in civil cases involving lower sums of money and criminal cases involving less serious charges.

Offences with less onerous penalties, and the preliminary stages of criminal proceedings, were dealt with by magistrates and justices of the peace, who were appointed by the provincial government, and often conducted court business on a part-time basis.

This three-level trial court structure characterized all provinces at the time they joined confederation (four originally, three more within the next decade, two in 1905, and Newfoundland in 1949), except the province of Quebec, which never had district or county courts, but had a Superior Court whose judges resided at a larger number of locations than their counterparts in Ontario, British Columbia or other provinces. Before the mid-1960's, reforms did not alter the structure of the courts, but instead tended to shift jurisdiction down the hierarchy, retaining the smaller caseloads of the superior courts, increasing the civil jurisdiction of county and district judges, and giving magistrates increased jurisdiction in criminal and family matters, and sometimes in civil cases now termed "small claims."

Reforms in court organization were not often contemplated. Then as now, neither politicians nor the general public saw them as the most pressing issues facing the society. Furthermore, structural change in the courts was not easy to achieve. Any provincial proposal to merge superior and county/district courts would require concurrent amendments to the federal Judges Act, which set out the number of judges which could be appointed (and paid) by the federal government pursuant to section 96 of the Constitution. Any proposal to add to the criminal jurisdiction of the magistrates or justices of the peace would involve amending the federal Criminal Code. (Unlike American or Australian states, Canadian provinces lack the authority to create criminal offences or legislate procedures in criminal cases.) Thus, any change in provincial law governing the organization of the courts would require some degree of consensus, lest opponents of provincial legislation go to the federal government to fight the changes.

Merger

In fact, the first provincial effort to merge superior and county courts failed. In 1969, British Columbia passed merger legislation, but the federal parliament never authorized the necessary amendments. The result has been attributed to the intervention of the Chief Justice of the Supreme Court, who preferred to maintain a smaller central trial court. Thus nine provinces had both superior and county/district courts until 1973, when merger went into effect in Prince Edward Island, easily the country's smallest province in both area and population. That same year, Ontario's Law Reform Commission rejected merger over one dissenting vote. [I.E., Part I, Ch. 3]

Merger became a major national reform thrust five years later, when Alberta, New Brunswick and Saskatchewan passed legislation within a year of one another, creating in each case a single Court of Queen's Bench as a superior court with resident judges serving an increased number of trial centres. Opposition was most vocal in Alberta, but federal enabling provisions moved smoothly through parliament. By 1980, five provinces had three levels of trial courts and five had only two levels.

Within the next few years, Manitoba merged its two section 96 courts, and then Newfoundland. In the first two weeks of May, 1989, Ontario and British Columbia introduced legislation to create a single section 96 court in those provinces. Although Ontario opponents took their campaign to Ottawa, there was little doubt that a single section 96 court would emerge. By the time B.C. and Ontario implemented their legislation in the summer of 1990, only Nova Scotia was left with a system of county courts. When that province announced the appointment of a commission under former Dalhousie Law Dean William Charles that year, there was every expectation that a merger recommendation would follow. As anticipated, the Commission's April 1991 report did recommend merger, and the provincial government immediately announced that it would introduce the appropriate legislation.

In summary, within a 20-year period, a two-level system of superior and county or district courts that existed in nine out of ten provinces since confederation has disappeared. We have gone from a time when Quebec's single superior court was unique to a time when every province has a single superior court.

Creation of Provincial Courts

Constitutionally, all superior courts are provincial courts – organized, administered and funded by the provinces (except for federal payment of the salaries and expenses of the judges, reflecting their appointment by the federal government). But over the past quarter-century, every province has created a separate court called the Provincial Court, with statutory jurisdiction including and building upon the work of magistrate's courts and other local courts. This development came even more quickly than merger; it was largely completed in less than 15 years. And yet within a single generation it has transformed a collection of judicial bodies often deprecated as appendages to local law enforcement authorities into a set of increasingly and thoroughly professional institutions with jurisdiction extending well beyond their counterparts in England or the United States.

Ontario's 1968 Administration of Justice Act is usually identified as the landmark statute abolishing magistrate's courts and creating a single Provincial Court of Ontario staffed by Provincial Court Judges, with jurisdiction in criminal, family and juvenile (later Youth Court) matters. The statute, enacting recommendations from the massive report of Chief Justice James C. McRuer's Inquiry into Civil Rights, [I.E., vol. 2] shifted administration of these courts from municipalities to the provincial government. Five years later, the major reforms undertaken by British Columbia's Justice Development Commission contained as a key element the creation of a provincially administered Provincial Court with a professional bench, with legislation modelled after Ontario. [Millar and Baar, I.A., ch. 13]

In fact, Ontario was not the first to replace a system of local "police courts". New Brunswick's Provincial Court was created the year before, during the period of Premier Louis Robichaud's equal opportunity program. And Quebec's Provincial Court was created in 1965, although the statutory courts in Quebec were organized much differently than their counterparts in the English Canadian provinces. The Quebec

Provincial Court was primarily a court with civil jurisdiction (comparable to the limited jurisdiction of earlier county or district courts in English Canada), while criminal jurisdiction was in the hands of the Court of Sessions of the Peace, also a court with a professional bench and a provincial administrative apparatus.

Once the largest provinces began reorganizing their magistrate's courts in the late 1960's, change came quickly. By the late 1970's, Nova Scotia was the last province to appoint a Chief Judge for its Provincial Court, and Newfoundland was the last province to name lay appointees (nonlawyers) to its provincial bench. When these changes began, the magistrate's courts were at the bottom of a three-level trial court structure, often linked more closely to local government officials with whom they shared responsibilities (and usually also shared physical facilities) than to the other two levels of section 96 courts. Now, as the second tier in a provincially administered court system, Provincial Courts have become an integral part of the judicial framework.

The existence of a Provincial Court in every province should not obscure the continued existence of fragments of statutory jurisdiction that lie outside either of the two levels of trial courts. Nova Scotia's Family Court has retained its unique status as a separate group of provincially-appointed judges whose court is administered by the provincial Ministry of Social Services. Quebec merged its Provincial Court, Sessions Court and Youth Court into a single Cour du Québec in 1988, but has retained a myriad of locally administered Municipal Courts (now unique in Canada) whose three largest locations also share jurisdiction over certain Criminal Code proceedings. Small claims courts have an anomalous status in Nova Scotia that makes them more closely resemble administrative tribunals. And Ontario's Provincial Offences Act (POA) Courts, while administratively linked to the Provincial Court, have given jurisdiction to lay Justices of the Peace unrivalled elsewhere in Canada.

At the same time, however, these exceptions, driven by the demands of large numbers of low-penalty offences and low-dollar civil disputes, are few. Given the relatively wide legislative jurisdiction of the provinces, it is remarkable that more diverse alternative models have not yet emerged.

Unified Family Courts

This third area of structural reform has thusfar yielded more diverse results. The creation of unified family courts – that is, bringing together all family law matters in a single court with a single class of judges – remains largely incomplete, and is thus quite different from the previous two fully-implemented reforms. Understanding its limited success will be particularly important in examining current issues in trial court unification.

By the mid 1970's, a concerted effort was under way to bring family law disputes into one court. Up until that time, the drawing of a line between matters within the exclusive jurisdiction of superior court judges (divorce and division of property) and those that could be assigned to provincially-appointed judges (custody and access, child welfare, enforcement of child support) had resulted in different elements of a dispute involving the same adversaries being adjudicated in two different courts. As the reform of substantive family law expanded in the 1970's and 1980's, deficiencies of the split jurisdiction were decried by academic experts, federal and provincial law reform commissions, and family law practitioners.

Unlike either merger or the creation of Provincial Courts, which were entirely provincial initiatives, unified family courts owed their development to federal government efforts as well. By the late 1970's, the federal Department of Justice encouraged the creation and agreed to joint funding of four pilot unified family courts in four different cities – St. John's, Newfoundland; Fredericton, New Brunswick; Hamilton, Ontario; and Saskatoon, Saskatchewan. Prince Edward Island expressed interest in having a pilot court, but given its small size, PEI's "pilot" was provincewide and hence not eligible. PEI then created a unified family court separate from the federal project, the first in Canada.

Following the success of the four pilot courts, New Brunswick expanded the concept across the province, but the other three jurisdictions did not. St. John's, Hamilton and Saskatoon retain their unified family courts, but to this day Newfoundland, Ontario and Saskatchewan have not expanded the concept further. In the meantime, Manitoba created a unified family court in Winnipeg and the eastern part of the province at the same time that it merged its superior and district courts, and recently extended the unified family court into western and northern communities. Thus, family court unification has taken place in six provinces since 1977, though completed in only three.

While the federal government supported the pilot projects, unification of family courts has entailed particularly delicate issues of federal-provincial relations. Like the other two reforms, concurrent federal legislation is required to implement a provincial act. Unlike the other two reforms, however, the design of a unified family court is affected by the operation of section 96 of the Constitution, the provision giving the power to appoint superior court judges to the federal government. A century of constitutional interpretation has given section 96 an additional dimension: if only the federal government can appoint superior court judges, then neither provincial nor federal government can remove essential elements from the jurisdiction of a superior court judge and place those responsibilities in the hands a court or tribunal whose members are appointed by the provincial government.

This understanding of section 96 means that unification of family law matters in a single court requires that the court be composed of federally-appointed judges, since matters affecting the division of property are within the fundamental core of superior court jurisdiction. Yet existing family law litigation is split between the superior courts and the Provincial Courts – between federally-appointed and provincially-appointed judges. Thus unification of family courts, unlike either merger or the abolition of magistrate's courts, would mean a redistribution of appointing authority. Either the federal government appoints large numbers of judges formerly appointed by the provinces, or the provincial governments secure some method for limiting federal discretion over appointments that had previously been in provincial hands.

The current stalemate has led some reform advocates to suggest amending the constitution. Most recently, the 1987 Report of the Ontario Courts Inquiry (the Zuber Report) advocated that family law matters be unified within the Provincial Court, and to the extent that this was precluded by the constitution, an amendment be sought. However, the strongest supporters of a unified court for family law matters want that court to be a superior court, and would oppose unification "down".

In fact, the three provinces with fully unified family court systems have placed all family law matters in their superior courts, with New Brunswick and Manitoba each creating a Family Division within its Court of Queen's Bench. Thus legislation creating unified family courts has not created a new court, but shifted that portion of family law matters formerly within the jurisdiction of provincially-appointed judges to the superior court.

While support for unification of family law matters in the superior courts has been maintained and has even grown, no unified family court legislation is currently pending in any provincial legislature. In contrast, three mergers have been completed and a fourth is pending – all since the most recent adoption of a unified family court.

ASSESSING THE REFORMS IN TRIAL COURT STRUCTURE

Where do we stand after 25 years of reform? Let us begin with the two trial court reforms that have been completed nationwide – merger of section 96 trial courts and creation of provincewide professional Provincial Courts. These two changes have moved the trial courts of this country from what was essentially an English model to one that is more distinctively Canadian.

The trial courts of 1961 bore a striking resemblance to their English forebears. Each province save Quebec had three levels of trial courts, each one comparable to its English counterpart:

(1) A small, elite central trial court with the inherent supervisory judicial authority of a superior court in England. The central trial court had a full range of civil jurisdiction involving disputes of any monetary amount, exclusive authority to issue prerogative writs, and exclusive authority over the most serious criminal offences. All justices of the court would reside in one or perhaps two urban centres, going on circuit or on the assizes to suitable locations throughout the province.

(2) A set of county or district courts, which would like the English county courts "take justice to every man's door." [Sissons, I.B.] County court civil jurisdiction was set by statute at an amount that would exclude most nonroutine matters; by 1961, monetary limits ranged from $500. to $5000. Criminal jurisdiction included nonjury trials in all provinces and jury trials in some; county court judges generally had a much higher proportion of criminal business than did their superior court counterparts. On the civil side, a practice developed by which the county court could try civil disputes regardless of dollar amount with the consent of both parties, a consent that would become increasingly common outside those few urban centres served by resident judges.

(3) A set of magistrate's courts that still largely resembled the English system of lay courts, although law-trained magistrates were increasingly typical in Canada. Magistrate's courts were largely criminal courts, although they had expanded to become juvenile courts, handled related family matters, and in half the provinces adjudicated small civil claims as well.

By 1991, these three levels had been reduced to two, and each level was fundamentally different from the three that remained in England:

(1) A larger and more dispersed superior court, with a greater mix of civil, criminal and family matters.

(2) A professional, province wide court for the processing of most criminal matters. In a substantial number of provinces, this court's predominantly criminal workload is supplemented by a wide variety of sensitive family matters, as well as civil disputes up to a fixed statutory limit.

Canada's current superior courts are much different from the central trial court in England, where to this day the members of the High Court of Justice sit in London and travel to other court locations, however large they may be. [Ingman, III.] Canadian superior courts hear a variety of cases that their English counterparts gladly leave to circuit judges and county judges. Similarly, Canada's current Provincial Courts bear little resemblance to English Magistrate's Courts, which have no jurisdiction to try indictable offences and rarely preside at preliminary hearings – two tasks that are an important part of the work of Canadian Provincial Court judges.

This shift away from an English model of trial court organization reflects a change in the sensibilities of Canadian society. Consider the reflections of respected Ontario County Court Judge Helen Kinnear, as she discussed reforms for her court in the February 1954 Canadian Bar Review:

> *Although I have been rash enough to suggest certain changes in the administration of justice at the county court level,I do not overlook the general excellence of our judicial machinery in Ontario or the debt we owe our legislators since 1791 for their obvious concern about the courts. Nor do I overlook our debt to the Mother Country for the basic principles on which our system was founded and the example she has set us during the years we have governed ourselves. It is quite apparent, from a reading of the statutes, that legislators in Ontario have always been alert to note changes in the machinery of justice and procedure in England and quick to copy obvious reforms. [Kinnear, I.E., p. 160]*

Aside from the likelihood that contemporary Canadian judges would be less effusive in their praise of legislators' "obvious concern", they would also be unlikely to define progress as the copying of English reforms.

The major reform in the structure of English trial courts in the last quarter century was the creation of the Crown Court, which has no counterpart in Canada. The Crown Court is a specialized criminal court for the trial of all indictable offences. There are no Crown Court judges, except when judicial officers from the other courts are assigned to sit in the Crown Court (sometimes for long or even indefinite periods). The Court is essentially a vehicle for the coordinated processing of criminal cases once they have left the Magistrate's Courts.

In the mid-1970's, then-Chief Justice Nathan T. Nemetz of the British Columbia Supreme Court saw the Crown Court as a model for Canadian provinces, because it would allow experienced criminal practitioners appointed to superior courts, who rarely had an opportunity to sit on criminal cases, to be assigned more frequently to criminal trials. However, merger of Supreme and County Courts in B.C. and other provinces has largely addressed that issue. Thus the expansion of superior courts in Canada was not only a new direction – away from the Mother Country's system – but it simultaneously reduced the relevance and attractiveness of the new Crown Court.

If we in Canada have moved away from an English court system in the past generation, have we merely adopted an American model instead? No, we have not. It is certainly true that superior courts in the United States – usually labelled "general jurisdiction trial courts" – are more dispersed geographically and varied in their subject matter; in that sense Canadian superior courts are moving in the direction of their counterparts in most of the 50 states. But there is a sharp difference between our Provincial Courts and the "limited jurisdiction trial courts" south of the border.

No limited jurisdiction trial court in any state in the United States can try a major felony. Its authority extends only to misdemeanors and other offences punishable by no more than one year in jail. A small number of exceptions have grown up recently, allowing a plea of guilty to a more serious felony to be taken in a limited jurisdiction court. Yet every day in every province in Canada, Provincial Court judges try indictable criminal offences which carry penalties as high as life imprisonment.

The differences between Canadian and American courts of limited jurisdiction extend to civil matters as well. In the U.S., virtually all of these courts have both civil and criminal jurisdiction, with civil jurisdiction commonly extending as high as $25,000. In contrast, half the Provincial Courts handle no civil matters. Thus lower level trial courts in American states tend to be limited to low-penalty criminal and low-dollar civil matters, while their Canadian counterparts handle more (and more important) criminal work and less civil business. It appears that Canadian Provincial Courts are more specialized by subject matter than American limited jurisdiction courts.

EXPLAINING REFORMS IN TRIAL COURT STRUCTURE

The reform trends presented in this chapter seem almost inevitable from our current perspective. Yet England retains a nationwide system of part-time lay magistrates and an elite central trial court. How was it that Canada moved to professionalize its magistrate's courts, and merge its superior and county courts? An explanation requires that we examine why these reforms were put forward, how they would have gained momentum, and why opposition to them either proved ineffective or did not materialize.

Ironically, it may be that these reforms emerged from the very efforts to maintain the traditional system of superior courts as small central trial courts. These efforts required that increasing superior court business, particularly in civil litigation, be restricted. For example, with the growth of motor vehicle accidents as a source of large civil claims, the superior courts were called upon to adjudicate large numbers of cases involving substantial sums of money but increasingly straightforward legal issues. The complexity of civil cases was no longer (if it had been before) related directly to the amount of money in controversy.

The obvious alternative was to shift cases from the superior court to the county and district courts. But doing so, through increased statutory limits and through the use of consent jurisdiction (unknown in U.S. limited jurisdiction courts), placed new burdens and responsibilities on those courts. Greater care would be necessary in selecting judges to try matters with more money at stake, and more effort would be necessary to coordinate work of county and district courts, lest the increased volume of litigation fall too unevenly from one county or district to another. Some work of those courts might in turn be shifted to other settings.

To the extent that magistrates would inherit increased numbers of serious criminal offences, demands would arise that they be better able to exercise their responsibilities. Better qualified individuals would be needed, requiring in turn better salaries and working conditions, and more certain guarantees of independence that accompany increases in both status and responsibility. While these demands would increase provincial costs to administer justice, they would also enhance the prestige of provincially-appointed judicial officers. Thus provincial governments would have added incentive to professionalize magistrate's courts – the public would see enhanced quality, and appointees would see more attractive rewards.

As professionalized Provincial Courts emerged from these reforms, so too did increasingly professionalized county and district courts. The responsibilities of the local judge were combined with growing provincewide responsibilities of the county and district bench. As those judges began to assert their qualifications to do a wide range of superior court work, the ability to resist their blandishments became increasingly difficult. Initially, merger took place in provinces sufficiently small that the merged court would still be a workable collegial unit. To the extent that later mergers in Ontario and B.C. might have been less workable, arguments to that effect, after six smaller benches had already merged, proved less persuasive.

The start of this cycle of structural change can be illustrated if we travel back to the opening of the Ontario courts in Toronto on January 9, 1961. The Treasurer of the Law Society of Upper Canada, Mr. John

J. Robinette, Q.C., addressed the assembled justices of the High Court, with their Chief, James C. McRuer, presiding. Said Robinette:

> *The work of your lordships' courts during the past year has been extraordinarily heavy, and it is almost miraculous that your lordships have been able to keep abreast of the growing volume of litigation in the Supreme Court of Ontario. That growing volume comes not only from the normal increase in an expanding community in normal fields of litigation, such as automobile accident cases, contract cases and the like, but it also comes from entirely new heads of jurisdiction which have developed during the past ten or fifteen years ["important commercial litigation..., judicial review..., labour law..., land-use control..."].*
>
> *For all these reasons the work of the courts has been very heavy and will likely be heavier during 1961. There may be need for some additional judges in the High Court of Justice, but, with the greatest respect, I suggest that it is not desirable that the court indefinitely be expanded, and I suggest for the consideration of the proper authorities that more of what is, I think, today the unnecessary burden on this court could be removed if the monetary jurisdiction of the county court judges in automobile accident cases at least were increased, and I can see no reason, with respect, why that should not be increased to cases involving claims up to $10,000. If this were done it would leave the members of this court more judicial time available for more important fields where the policy of the law needs elucidation. . . . [Silk, I.E., pp. 2-3]*

By the end of January, Ontario Attorney General A. Kelso Roberts requested his Assistant Deputy Attorney General, Eric H. Silk, Q.C., to undertake a wide ranging study of county and district court jurisdiction.

Silk's 144-page report recommended that county and district court jurisdiction be increased. It stood at $1000., $1200., and $4000., depending upon the matter at issue, and he recommended limits of $2500. and $10,000. A similar wave of increases was breaking in other provinces, but none went higher than $5,000. (B.C. tested a $7,500. limit in 1957 and dropped it to $5,000. the following year. Alberta stood at $1,000., up from $600.) [Silk, I.E., p. 32] The recommended increase was conditioned upon what Silk termed a "system of interchange" – moving judges across county and district lines as workload warranted.

At the same time, the Report recommended removing a variety of quasijudicial and administrative tasks from the county court judges. In many areas, the county judge still reviewed citizenship applications. Labour arbitrations were a common source of outside income. And at least 63 provincial statutes conferred administrative tasks on the county judge as *persona designata.*

The Silk Report involved substantial research, and followed 32 public meetings throughout the province. Its recommendations enjoyed the widespread support of the bar, and presumably of both the High Court and County Court benches. Yet, because it helped transform county judges from independent local officials with limited trial jurisdiction to judges with broader province wide adjudicative responsibility, it marked an important step in the evolution of a single section 96 trial court. Ironically, the Report has been long forgotten; Ontario's 1987 Zuber Report lacked even a bibliographical reference to it.

CURRENT DIRECTIONS IN STRUCTURAL REFORM

Examination of the two "completed" trial court reforms has shown the shift from an English to a Canadian court structure. But what about the third major reform, the unified family court? Unified family courts have secured broad support, but have been only partially implemented. In fact, they represent still another shift, but the direction of that shift is not yet clear. The unified family court represents at least two potential and possibly conflicting directions:

(1) By structuring a trial court in terms of legal subject matter, we may be moving toward a functional division of trial courts. In family matters, the present division between a superior court and a statutory court would be abolished. As a result, most Provincial Courts would become almost exclusively criminal courts. Existing superior courts would be dominated by civil work. In this scenario, family matters would be adjudicated at the superior court level, but by specialized judges who would function alongside but separate from their colleagues who specialize in civil matters.

(2) By eliminating the distinction between a superior court and a statutory court in family matters, the unified family court may be an initial step toward eliminating two-level trial courts in civil and criminal matters. This is the scenario contemplated under Ontario's "Phase Two," by which its new two-level General Division and Provincial Division are combined into a single Ontario Court of Justice. Nonstatutory divisions between civil, criminal and family matters may exist, but with a degree of flexibility greater than in the functional organization described above.

Lawyers and judges who have advocated unified family courts have been wary of the first scenario, because rigid specialization would give family court judges little relief from a steady diet of more emotionally charged litigation, and could reconstruct the status differences that once separated levels and could now separate subject matter. Conversely, however, the second scenario could produce new or more intense opposition to a unified family court from those opposed to a unified criminal court.

Given these conflicting scenarios, it is not surprising that unified family courts have been only partially implemented. In Quebec, reform emphasizes a reduction in the work of the superior court, so family matters remain divided. In Ontario, current government policy calls for unifying family jurisdiction only in conjunction with unifying criminal jurisdiction, so family matters remain divided. In British Columbia and Alberta, change in trial court structure is not a current option for improving the effectiveness of family adjudication, so those matters also remain divided.

After June 1990, however, when the provincial attorneys general endorsed in principle complete unification of the trial courts, the second scenario became the stated goal of the next generation of structural reform in the courts. Complete unification would move yet another long step away from the English model, but would also break fundamentally with the existing Canadian model – eliminating the two levels of trial courts and with them the distinction between federally-appointed and provincially-appointed judges.

The model that would emerge could best be termed the "American Bar Association model" because it follows the prescriptions set out in the ABA's Standards Relating to Court Organization. The American Bar Association standards were freshly enunciated in 1990, but the principle of a one-level unified trial court was essentially the same one endorsed in the 1974 standards, which built in turn on standards going back to 1938:

> *The structure of the court system should be simple, consisting of a trial court and an appellate court, each having divisions and departments as needed. The trial court should have..., where appropriate, specialized procedures and divisions to accommodate the various types of criminal, civil and family matters within its jurisdiction.... [Standard 1.10]*

> *The trial court should be organized as a single level court [and] should have a single class of judges. [Standard 1.12]*

While Canadian provincial attorneys-general unanimously endorsed the American Bar Association model, it would not be accurate to say that they favour an American-style trial court. In fact, very few American states have implemented the ABA's prescription for a one-level trial court. In the past ten years, only one additional state has unified its trial courts, and most unification efforts, as Chapters Three, Four and Five will illustrate, deviate in important ways from the ABA's "one best way" to organize the courts. At the same time, however, the ABA standards articulate an ideology about the courts that fits comfortably into liberal principles of formal equality that dominate the rhetoric of American political and legal culture.

By adopting the ABA model as their goal in court reform, the attorneys-general are moving in a direction unlike that of their counterparts in most other countries of the world. Elsewhere in the Commonwealth, more conservative approaches are dominant. The five mainland Australian states all have three levels of trial courts on the English model, and current reform focuses on professionalizing and expanding the jurisdiction of magistrate's courts. The one state that merged its supreme and district courts redivided them 35 years later. In New Zealand, a major Law Commission study of the country's two-level court structure recommended expanding the jurisdiction of the Magistrate's Court and maintaining a small Supreme Court. The Commission's Report approvingly cites Ontario's Zuber Report, and its model resembles most closely the Quebec court structure. India's two level court structure – each state has a High Court and a District Court – is in some sense closest to Canada, since India followed our constitutional example and made High Court Justices federal appointees and District Court Judges state appointees. But Indian jurisprudence has developed differently, allowing District Courts more room to expand, leaving High Courts with a high proportion of appellate work, and trial matters that deal primarily with commercial, contract, constitutional and property law. Throughout the rest of the Commonwealth, at least two trial courts have been maintained, even in small Caribbean nations.

A systematic survey of civil law countries has not been attempted for the current report, but material on continental European court systems suggests that multi-level trial courts are common. In contrast, Sweden has a unified trial court, part of a system administered through an innovative independent central agency, the Domstolsverket (the National Courts Administration, located in Jonkoping). Yet Sweden's unified trial court, however expeditious and effective it may be, remains fundamentally different from the ABA model. Like other continental countries, Sweden has a career judiciary, so that its unified trial courts consist of judges with several levels of responsibility and salary. There is thus more than one class of trial judge. Note also that the one level trial court is linked to a system of appeal courts that have the authority to reexamine witnesses heard at trial.

In short, the ABA model extends the concept of a unified trial court to require not only a single level court, but also a single class of judge – twin attributes not evident in trial courts elsewhere in the world. Yet this concept did not originate in the United States. It derives from an expansion of the unified trial court idea that Harvard law professor Roscoe Pound borrowed from the English Judicature Acts of the 1870's. Those Acts unified the variety of superior courts in England into a single High Court of Justice with one class of judge, a landmark reform in its time. By 1940, Pound articulated a model of organization that was termed unified, but the model still separated general jurisdiction and limited jurisdiction trial courts.

Other American court reform organizations took up the banner of court unification, and helped expand the concept. A key player is the American Judicature Society, founded in 1913 by Michigan journalist Herbert Harley. Harley sought ways to improve the practice of law and the work of the courts. In 1912, he visited Osgoode Hall in Toronto, and came away particularly impressed with the ability of the Law Society of Upper Canada to check abuses by its members, and the quality of Ontario's High Court of Justice, unified on the English model in 1882. On his return, Harley not only established AJS, but wrote and travelled extensively, preaching the need for a self-governing bar and a unified court. Under his successors in the years following World War II, the AJS worked with the ABA and with prominent judges and lawyers to promote court reform, including an expanded concept of trial court unification that drew some of its original inspiration from north of the border.

To summarize, the current direction of court reform takes us further from the English model that dominated Canadian trial courts in the country's first century, and beyond the distinctive two-level model that is dominant today. It posits a single trial court with a single class of judge. Since no Canadian province nor any other jurisdiction in the Commonwealth has such a court structure, an empirical study of the operation and effects of structural reform will require that we turn to the United States and search out jurisdictions that most closely approximate the ABA Standards. Chapters Three, Four and Five will focus on that task.

At the same time, there is as yet no empirical research that focuses on structural reform that has already taken place in Canadian courts. Therefore Chapters Six and Seven will examine provinces that have had the longest experience with merger and the widest experience with a unified family court. These experiences should help us relate the American findings to the Canadian setting.

THE BROADER CONTEXT OF INSTITUTIONAL CHANGE

Our examination of court structure takes place within a broader context in which the role of the courts is changing, and the roles of other political and social institutions are drawing increased attention from scholars and policymakers. We need not repeat the frequent assertions about how the role of the courts has changed and will continue to change since the advent of the Charter of Rights and Freedoms. For our present purpose, these assertions serve as important reminders that the public, which has always had a stake in the administration of justice, is now also much more aware of that stake, and quicker to call institutions of justice to account.

An increased concern with institutions of justice parallels the growing attention to other institutions in society. Scholars are increasingly writing about the autonomy of institutions – how they come to have a life of their own, moulding the behaviour of their members to a degree unrecognized by earlier generations of social scientists who focused on the psychological, economic or social class determinants of individual behaviour. Thus political scientists James

G. March and Johan P. Olsen have published a major recent book, Rediscovering Institutions: The Organizational Basis of Politics, which gives special attention not only to the impact of institutions, but also to the nature of institutional reform. English anthropologist and cultural analyst Mary Douglas synthesized her work a few years ago in a set of lectures titled How Institutions Think. Even contemporary Marxist theory has made room for institutions, to the extent that they mediate and deflect social and economic forces.

To what extent do courts shape the behaviour of the judges who serve them, the lawyers who work in them, the administrators who support them, and the public who comes to them? To what extent will a new organizational framework – a new trial court structure – alter those institutional demands, or produce new ones?

We are in a period when institutions more sensitive to market pressures are changing radically. The interprovincial and even international consolidation of large Canadian law firms is an example close to the courts, but not unique. Canadian courts have already changed more in the past 25 years than in the previous hundred. If institutions do affect who we are, it is essential to understand how institutional changes – in this case, changes in court structure – affect the nature of judging and the way judges see themselves.

Chapter Three

Structural Reform in Current Practice: Illinois and South Dakota

The next two chapters will examine the organization and current operation of unified trial courts in three states: Illinois, South Dakota and Minnesota. Illinois was chosen because it has the oldest system of unified trial courts in the United States (in operation since January 1, 1964), and because it is still the most populous state with a unified trial court (with over 11,600,000 people, more than any Canadian province). South Dakota was chosen because it is one of only three unified trial courts financed and administered by state rather than local authorities. Thus some of its key administrative processes might more closely parallel those of Canadian courts, which are administered by provincial rather than county or municipal governments. Minnesota was chosen both because it was the most recent state to unify its trial courts, so that participants would be more likely to retain opinions and memories from the transition, and because it comes closer than any other state court system to the American Bar Association model.

Before examining these three states, a brief note is needed to explain why other jurisdictions were not chosen. The selection was based upon review of a 420-page reference book, State Court Organization 1987, prepared jointly by the Conference of State Court Administrators and the National Center for State Courts. Part II contains structure charts for 50 states, the District of Columbia and Puerto Rico. Discussion with National Center staff (the Center, with its national headquarters in Williamsburg, Virginia, is the research, training and service arm of the state courts) indicated that no further unification has taken place since the 1987 data were compiled. This was confirmed by reference to 1989 court structure charts included in the latest (February 1991) report on American State Court Caseload Statistics.

Review of the charts show that 39 states (plus Puerto Rico) have at least two statewide trial courts with jurisdiction in a full range of civil and criminal matters. The dividing line between general jurisdiction and limited jurisdiction trial courts usually puts small claims and misdemeanors in the limited jurisdiction court, along with a small number of felonies, and civil claims up to as high as U.S.$25,000. Many states have a number of different limited jurisdiction courts, and some retain specialized courts (for example, probate or juvenile).

Of the eleven remaining, two (Iowa and Connecticut) were studied a decade ago in a substantial research project on court administrative reforms funded by the U.S. National Institute of Justice and directed by Thomas A. Henderson. Four others (Kansas, Missouri, Oklahoma and Wisconsin) were essentially unified, since their general trial court handled all criminal and civil matters, but local ordinance and traffic courts remained in all four, with Wisconsin's Municipal Courts retaining drunk driving cases as part of their traffic jurisdiction. Massachusetts was excluded because, while it has a single "Trial Court of the Commonwealth" with 281 justices all paid the same salary, that court has seven "departments" which correspond to the seven previously existing general, limited and special jurisdiction courts. Idaho appears to be similar in structure and administration to South Dakota, and the latter was chosen instead, along with Minnesota and Illinois. The District of Columbia was excluded because its jurisdiction is limited to the city of Washington and operates in a single courthouse. However unified it may be, its experience would be less useful in multi-courthouse jurisdictions in Canada.

The three chosen state court systems will each have their own distinctive features that differentiate them from Canadian courts and limit the relevance of American findings and transferability of American models. At the same time, some relevant patterns are likely to emerge, and reference will be made to the other more highly unified court systems when these patterns are analyzed in Chapter Five.

ILLINOIS

The Illinois court system is a fascinating study in contrasts. Its highly unified trial court, in which all cases from minor traffic to multimillion dollar civil lawsuits are tried, was the first in the nation. Yet in other areas of court reform, Illinois has lagged behind other states, maintaining a decentralized administrative apparatus sometimes dominated by locally elected clerks of court. Its judicial organization is so flexible that all 806 judges can be assigned to try any type of case in any county in the state, yet again and again one sees evidence of a degree of specialization as great as any found in the less flexible court systems in Canadian provinces. The skill and professionalism of many of

Illinois' judges and court administrators is impressive, yet the intensity of state and local politics, coupled with dramatic instances of corruption in Cook County, have taken an inevitable toll on men and women of quality and talent.

In a brief review of how Illinois' unified trial courts are organized, it will be difficult to capture these energies and tensions. However, it should be possible to suggest the setting within which the courts' administrative processes come into play.

Social and Constitutional Context

Current figures place Illinois' population at 11,658,000, larger than any Canadian province and all but four states. Over five million people are in Cook County alone, which includes Chicago and a large number of its suburbs. In turn, over six million people live in the 101 "downstate" counties which stretch 400 miles from north to south and over 200 miles from west to east. Of those six million, almost one-third live in the four "collar counties" that surround Cook. While the rest of the state is dominated by small towns and rural areas (Rockford is Illinois' second largest city), it still contains over four million people, even though the state's total area is far smaller than all but the three Maritime provinces. Illinois ranks 24th out of the 50 states in area.

The state was admitted to the Union in 1818, and its courts go back to 1778 under American authority, to 1763 under the English, and even earlier under the French. Thus, by the time of the major reforms of 1964, the state had a century-and-a-half to evolve a court system. The incremental process of creating new courts to fill new needs produced a system of circuit courts, county courts, city courts and probate courts, as well as justices of the peace and police magistrates. "In 1962," according to a brief official history of the Illinois courts,

> *...Cook County had 208 courts: The Circuit Court, the Superior Court, the Family Court, Criminal Court, Probate Court, County Court, Municipal Court of Chicago, 23 city, village, town and municipal courts, 75 justice of the peace courts, and 103 police magistrate courts. [Rolewick, II.C., p. 19]*

Court reorganization attempts had been made during the 1950's, and in November 1962 a constitutional amendment to unify the state's courts was passed by Illinois voters in a general election. That amendment enacted the Judicial Article of 1964, dividing the state into judicial circuits, each with a single Circuit Court and with three classes of judicial officers: circuit judges, associate judges and magistrates. The circuit and associate judges had full jurisdiction over all cases assigned to them, while the jurisdiction of magistrates could be limited by statute.

In 1969, a constitutional convention began meeting to undertake a general revision of the state constitution. The resulting 1970 constitution made a number of changes in the 1964 Judicial Article, including abolition of the office of magistrate. In practice, associate judges appointed under the 1964 Article were elevated to circuit judges, and magistrates were elevated to associate judges.

The 1964 and 1970 provisions remain the starting points for an understanding of today's trial court organization in Illinois. The state has 22 circuit courts, ranging in size from one to 12 counties. Circuits can be altered by statute. There were 21 circuits in 1964, and the number was increased when the three counties of the old 12th Circuit south of Cook County were divided, reflecting the expanding population of Chicago's south suburban areas. Circuit populations (based on the 1980 census) range from 135,902 in the new two-county 21st Circuit to over two-thirds of a million in two suburban Chicago circuits north and west of Cook County, and over five million in Cook County. Sixteen of the circuits fall within the range of 175,000 to 375,000.

As of December 3, 1990, there are 392 circuit judges, 177 in Cook County and 215 downstate. Circuit judges are elected for six-year terms. Candidates for a circuit judgeship must first run in a primary election to secure the nomination of a political party, and then run as the party's candidate in the general election. Once elected, however, circuit judges run for reelection under a retention system, in which the judge's name alone appears on the ballot, and the voters are asked whether he or she should be retained for an additional six-year term. A 60% majority vote is necessary for retention.

Appointments to fill vacancies created by nonretention or other causes are made by the state's highest court, the Supreme Court of Illinois. This is an unusual procedure, since it completely eliminates a gubernatorial role in judicial selection. In most states – even those classified as having elected rather than appointed judges – the governor usually appoints first, as judges retire or die, and new appointees go to the voters in the next election.

A distinction is also made in Illinois between resident circuit judges and at-large circuit judges. At least one circuit judge is elected in each county, and at least three circuit judges are elected circuit wide. The state legislature recently enacted a further variation of this division for Cook County: 94 of Cook's circuit judges are elected in the county as a whole, 56 in the city of Chicago alone, and the remaining 27 by county voters outside Chicago.

As of December 3, 1990, there are also 414 associate judges, 204 in Cook County and 210 downstate. Associate judges (sometimes called associate circuit judges, or simply associates) are appointed by the circuit judges in their circuit for renewable four-year terms. All associate judges must be legally trained, and the authority to place limits on their jurisdiction is given to the state Supreme Court by section 8 of the Judicial Article. The court's Rule 295 gives associates the same civil and family jurisdiction as a full circuit judge, and criminal jurisdiction in matters punishable by no more than one year in prison. In practice, associates handle the routine matters that traditionally fall within the jurisdiction of lower courts, although individual associate judges may be assigned to matters normally heard by circuit judges.

The chief judge of the circuit court is vested with substantial administrative authority. The chief judge is selected for renewable one-year terms (three-year terms in Cook County) by a vote of all judges in the circuit, including associate judges – although an associate may not serve as chief judge.

The more populous circuits have trial court administrators who are appointed by and responsible to the judiciary, but most circuits must rely on the administrative personnel of each county government, particularly those in the clerk of court's office. County clerks of court are elected on a partisan ballot and there is no requirement that their offices be staffed through a civil service system. The salaries and operating expenses of the clerk's offices are provided by county governments.

At the same time, a wide variety of trial court expenditures are financed out of the state budget: the salaries and expenses of the judges, the salaries and benefits of court reporters (including costs of indigent transcript preparation), the administrative assistant to the chief circuit judge, and mandatory court annexed arbitration programs.

The diverse geography of the state's circuits, combined with the strong authority of the circuit chief judges and the tradition of county administrative control, meant that it would be necessary to visit a number of circuits during my week in Illinois. Furthermore, it was also important to meet with persons experienced in handling the challenges of larger circuits. Interviews were therefore conducted at Marion, headquarters of the First Circuit covering the state's nine southernmost counties; Wheaton, the county seat of DuPage County, the state's second largest county and second largest judicial circuit; Waukegan, the Lake County seat in the two-county 19th Circuit north of Chicago (the state's third largest circuit); and Chicago, at the main downtown courthouse of the Cook County Circuit Court. State administrative personnel were interviewed in Springfield and Chicago, and a meeting was held with the new Chief Justice of Illinois (who had formerly been a chief circuit judge) and the new Administrative Director of the Illinois Courts, himself a former Supreme Court Justice and Chief Judge of the downstate 20th Circuit.

The gains in seeing a number of circuits resulted in sacrifices in the scope of coverage. In each circuit, I was able to talk with administrative personnel and with judges who have had administrative responsibilities. In most circuits, I was also able to meet other circuit judges. However, I was unable to canvass the views of the local bar or spend time with newer associate judges. Nor was I able to visit more than one courthouse in each circuit, meaning that the satellite courts that operate in the two largest circuits were not seen in action.

Another bias may be built in as a result of the useful and enthusiastic assistance of the Administrative Office of the Illinois Courts in arranging meetings in the local circuits. Because the AO responded to my requests and ensured that I would have the opportunity to interview the most informed and experienced judicial and administrative personnel, it is likely that I have examined an unrepresentative sample of circuit courts. These four circuits may have realized more of the potential benefits of unification than other circuits, to the extent that their chief judges have devoted more attention to the management of circuit affairs, and have had the benefit of professional court administrative support.

Unified Trial Courts in Operation

Work is assigned to circuit and associate judges through a combination of statewide rules and local circuit practices. In a multi-county circuit with fewer judges, such as the First Circuit in southern Illinois, one to three circuit judges are assigned by the Chief Judge to handle cases in each county, and circuit judges in the smallest counties (with no more than one-two days work per week), sit on a continuing basis in busier counties within the circuit. Six associates sit along with the 14 circuit judges; most are assigned full-time to the two largest counties, while others divide their time among the remaining counties. In the smallest counties, a circuit judge may hear all types of cases, rather than bringing in subject matter specialists or associates.

In the two-county 19th Circuit north and west of Chicago, there is sufficient work in each county that full-time circuit judges sit at each county seat. While judges used to rotate between the two – or, more accurately, judges in the smaller county would be assigned to try cases in the larger county – this occurs less frequently now, partly because the caseflow management system operating in the larger county requires more continuous interaction among the sitting judges. One of the three circuit judges in the smaller county has been designated the Presiding Judge for that county. The larger county has grown sufficiently to set up divisions, so that one of its six judges is Presiding Judge of the Civil Division and another is Presiding Judge of the Criminal Division. Five associates sit in the smaller county, and their work is assigned by the county presiding judge. Twenty-one associates sit in the larger county; one serves as Administrative Judge of the Family Division, another as Administrative Judge of the Traffic Division, and another as Supervising Judge for Mandatory Arbitration. [See the 19th Circuit's 1989 Annual Report, II.C.]

The 18th Circuit, covering DuPage County just west of Chicago, has ten circuit judgeships and 26 associate positions. The circuit judges sit in the central county courthouse complex, along with a few associates, but the bulk of the associates sit in a number of satellite courts that specialize in traffic, small claims and juvenile, along with some family law matters such as child support enforcement. A number of circuit judges have also been designated as presiding judges, and civil cases have been split between a Law Division (civil jury cases) and a Chancery Division (nonjury matters), each with separate presiding judges.

In Cook County, the structure is even more fully elaborated, as one would expect in a court with almost 400 sitting judges. There are two departments. The County Department has seven functional divisions. The Law, Chancery, Probate, Domestic Relations and County Divisions and their presiding judges sit at the central courthouse; the Criminal Division is centred in a separate criminal court building just southwest of downtown and operates in two suburban facilities as well; and the Juvenile Division sits just south of downtown. The Municipal Department is divided into six geographical districts, each with a presiding judge. The Chancery Division generates enough business that one judge has been designated Supervising Judge of the Mechanics Lien Section, and has three other judges assigned full time to his section. The First Municipal District in Chicago operates separate Criminal, Housing, Eviction, Traffic, Bond and Marriage Courts, as well as both civil jury courts (for disputes under U.S.$15,000.) and small claims courts.

It appears that as the four circuits grow in size, administrative terms and judicial assignments tend to extend longer, even though the opportunities for rotation should in fact be greater. This is illustrated most dramatically in the Cook County Circuit Court, which has had only two chief judges since its creation on January 1, 1964. The first served 14 years, and the current chief judge is completing 13 years. Only four other chief judges have sat as long in any of the other 21 circuits. The Cook County pattern carries through at the presiding judge level. For example, the current Presiding Judge in the Domestic Relations Division served four to six years in previous assignments; he began as the court administrator under the first Chief Judge. The Presiding Judge of the Chancery Division served for many years before his defeat at the polls in November 1990 amid rumours of corruption; he was indicted a month later by federal authorities. Sitting assignments in each division can also continue indefinitely; I met one circuit judge who has sat in the Law Division doing only civil jury trials for his ten years on the bench.

The remarkable specialization in Cook County is not matched in the two collar county circuits. In the 18th (DuPage County), the chief judge elected in 1984 was replaced in 1990. The two-county 19th Circuit has a pattern of electing chief judges for two year periods. In contrast, the First Circuit chief has served since 1982. While these three circuits differ from Cook in the continuity of the chief judge and the degree of internal specialization, there are features of all three that suggest a relatively high degree of specialization. Judges sit indefinitely in civil, criminal, family and even traffic cases in the 18th and 19th Circuits. The notion that judges should rotate throughout a circuit on a regular basis does not exist, in marked contrast to policies in Minnesota as well as in Canadian courts, for example Alberta's Court of Queen's Bench or the eight regions of Ontario's Court of Justice (General Division).

While rotation is absent, flexibility in judicial assignments is very much present. The 19th has nine circuit judges assigned in the two counties, but a tenth circuit judge was assigned in December 1989 to the Court of Appeals, an intermediate appellate court. In Cook County, two associate judges are assigned full-time in the Law Division hearing civil jury cases, and circuit judges and associates sit together in a number of divisions. Both circuit judges and associates are frequently assigned as visiting judges outside their home circuits. Out-of-circuit assignments in downstate circuits are usually a product of recusals arising out of who is litigating or who is representing litigants. In 1988, 23 circuit judges and eight associates were temporarily assigned to other downstate circuits.

Cook County is the most frequent recipient of visiting judges, particularly from circuits where county workloads are too small to occupy resident judges on a full-time basis. Three circuits provide some 50 weeks of visiting judge time a year to Cook County. One of those circuits agreed to expand its time to 52 weeks in exchange for the rental of a Chicago apartment for the visitors to stay, saving the cost of a hotel and providing more attractive accommodation. In 1988 alone, 360 judge-weeks of service were provided in Cook County by 147 circuit and associate judges from 16 downstate circuits.

The flexibility of assignment is facilitated by the broad overlapping jurisdiction of circuit and associate judges. Even the Rule 295 restriction on associates sitting in criminal matters punishable by more than one year in prison is regularly waived on the request of chief circuit judges. The First and 19th Circuit chief judges routinely request this waiver for all their associates; in 1988, Cook County did so for 131 of its associates (19 for a six-month period and 112 for the entire year). A total of 98 downstate associates received a full year's waiver in 1988, and 24 more for periods from one to eleven months.

At the same time, it is obvious that associates normally sit on matters that fall within the traditional bailiwick of the lower courts, just as circuit judges normally sit on matters that previously fell to the superior courts. Flexibility allows skilled or experienced associates to receive better assignments, just as flexibility allows a chief judge to assign a less effective circuit judge to more routine matters. But the pecking order is clearly evident. Circuit judges dominate administrative positions, even in divisions staffed largely by associates. Not all circuit judges receive the assignment that one former judge considered ideal – "a full list of civil jury trials, with an occasional smattering of sex and violence from the criminal felony list." But neither do they have to fear that unification of the trial court will result in their sitting in traffic court, or on routine high-volume matters in other divisions.

A review of the current assignments in Cook County, as shown in Table 3-1 on the next page, illustrates these points. Every presiding judge position is taken by a circuit judge, even in divisions and municipal court districts dominated by associates; only one supervising judge position is occupied by an associate judge. Associates are not assigned to Chancery Division except to do mechanics lien actions, and they are outnumbered 45-7 in the Law Division. Criminal and Domestic Relations are shared more evenly, although the six team leaders in the latter division are all circuit judges. Finally, associates dominate the Juvenile Division 14-2, and the Municipal Department (all six districts) by a substantial 124-19 margin.

In summary, it is clear that a hierarchy of judicial business is reflected in the assignment patterns of circuit and associate judges in Cook County, and in administrative assignments that confer authority on one judge to supervise the work of other judges. Even in Chicago's Traffic Center, made up entirely of associates, the supervising judge has been a circuit judge. At the same time, this overall pattern has not precluded assigning circuit judges to municipal districts to handle small claims, or assigning associate judges to civil juries. Less graphic but equally entrenched patterns are visible in other circuits. For example, one factor in the election of a new chief judge in DuPage was his promise to appoint only circuit judges to preside over divisions of the court.

Circuit Judges and Associate Judges

The continuation of a pre-existing distinction among two levels of judges within a formally unified trial court should not obscure many of the ways in which the associate judge system has contributed to the effective operation of the circuit courts. First, it has provided a training ground for future circuit judges. Three of the 19th Circuit judges I met in Waukegan began as associates. While I was unable to obtain statewide figures, this pattern of promotion is not unique. In fact, it was one of the hopes of unification advocates at least as long as 20 years ago that promotion of associate judges to the circuit bench would reduce the impact of partisan elections. If political parties seeking circuit judge candidates would draw from a pool of associates originally selected by the circuit judges, perhaps better qualified and more experienced individuals would win election. [Cf. Boyle, II.C., pp. 344-45.]

The selection process for associates now also includes a bar poll conducted by the Committee on Judicial Advisory Polls of the Illinois State Bar Association. When an appointment is pending, candidates' names are placed on a secret ballot which is sent to all members of the bar within the circuit. Lawyers are asked to rate the candidates in four areas: judicial

Table 3-1

Distribution of Circuit Judges and Associate Judges by Division, Cook County Circuit Court, December 19, 1990

Division or Section	Presiding/ Supervising Judges	Circuit Judges	Associate Judges	Recalled Judges
Chancery	1 CirJ	11	0	0
Mechanics Lein	1 CirJ	1	2	0
Juvenile	1 CirJ	2	14	1
County	1 CirJ	4	2	1
Probate	1 CirJ	5	4	1
Criminal	1 CirJ	30	14	0
Law — Jury Section	1 CirJ	33	2	3
Tax Section	1 CirJ	3	2	0
Motions		5	0	0
Pretrial	1 CirJ	2	0	0
Pretrial—Med Ctr	1 CirJ	2	3	0
Assignment/ Progress Call		0	2	1
Domestic Relations*	1 CirJ	15	16	2
Municipal				
Districts 2-6	5 CirJ	9	69	1
District 1 (Civil)	2 CirJ, 1 ACJ	8	16	4**
(Criminal)	1 CirJ	2	25	0
(Traffic)	1 CirJ	0	14	0
(Marriage)		0	0	1

Notes:

Source: Data were obtained directly from the large information board in the reception area outside the Circuit Court Administrator's office.

Presiding and supervising judges listed in the first column are not included in the remaining columns. Recalled judges are retired judges sitting by special assignment.

Five circuit judges were then assigned to appeal court; three circuit judges, eight associate judges and one recalled judge were on vacation or sick.

*Divided into six teams with a preliminary judge and four trial judges. All six preliminary judges (team leaders) are circuit judges.

**Plus two visiting judges in permanent courtrooms.

integrity, judicial temperament, legal ability and court management. Ballots are mailed to the State Bar Committee, which tabulates the results and forwards them to all candidates and circuit judges within the circuit. The results for candidates whose scores are high enough to be recommended are released to the media; the rating of a candidate who is not recommended is released only if that candidate is selected for the position.

The bar polling procedure thus creates a public accountability process unknown in Canada. While the chief judges have expressed concern about the polls' methodology and disclosure, bar polls have gained support because they strengthen so-called "merit" criteria in a system otherwise dominated by partisan politics. The heads of county party organizations know that associate judges may become future circuit court nominees, so more aggressive party chainnen have been known to push favoured lawyers for selection as associates. The bar polls provide a counterweight to this political pressure. It was clear from interviews in one Republican county that circuit judges felt it especially important for the independence and effectiveness of the court that members of the circuit bench choose the best qualified candidates and resist partisan pressure, even if it comes from county leaders who could influence how the county board handles the court's budget requests.

The selection of associate judges by the circuit bench plays another important function in a system of elected judges, particularly in counties or circuits dominated by a single party. An able lawyer serving as an associate judge may be unable to win election if he or she is a member of a minority party (e.g. a Republican in Chicago, or a Democrat in DuPage County). If so, circuit colleagues could reappoint the associate, and the chief judge could assign him or her to matters usually reserved for circuit judges. This possibility provides an important counterbalance to partisan selection procedures.

For a variety of reasons, then, associate judges may often serve for long periods, well beyond an initial four-year appointment. Of the 26 associates serving in the 19th Circuit on December 31, 1989, six had first been appointed between 1971 and 1978, four in 1981, and another six between 1982 and 1985. Thus 16 of 26 had served more than one term, 10 had served more than two terms, and two associates would have been in their fifth term of office. Of the 26, all but four were appointed between 8 and 16 years out of law school; two relatively junior appointees were named in 1981 (four and seven years out), and two relatively senior appointees were named in 1986 (21 and 23 years out). The tradition of elevating associate judges in the 19th may help explain why the ten current circuit judges had been out of law school for longer periods – 14 to 26 years prior to their initial election.

The two-tier system of circuit and associate judges can produce some anomalies. In one circuit, an unsuccessful candidate for an associate judgeship ran for circuit judge in the next election and won. While he had been recommended by the bar, his rating was lower than that of the candidate who secured appointment and was sitting with him. On the whole, however, former associates now sitting as circuit judges like the system, and consider their associate judgeship to be excellent experience. Whether current associates – either new or long-term appointees – would share that positive assessment will require further inquiries.

One factor that could differentiate the two groups of judges is salary. Yet the salary differential is little more than U.S.$5,000. On July 1, 1991, Illinois trial judges received a 4.37% pay raise, giving circuit judges an annual salary of U.S.$84,123., and associate judges U.S.$78,396. The U.S.$5,000. salary differential has remained virtually unchanged since unification in 1964, when the gap was much larger in both percentage and real dollar terms – a difference between U.S.$10,000. and U.S. $15,000. annually. So state policy has clearly been to avoid widening the salary gap. Note that while current salaries – even with the recent increase – are well below comparable Canadian judicial salaries, Illinois superior court judges' salaries still rank 16th out of the 50 states.

Despite the small salary differential, evidence suggests that the state legislature has been more willing to create associate judgeships than circuit judgeships. As of November 1989, there were 389 circuit judges and 363 associate judges. Thirteen months later, there were three additional circuit judgeships and 51 new associate judgeships, representing a clear legislative choice to increase the size of the lower tier. The result is that multi-county, slow growth (or no growth) circuits have a higher proportion of circuit judges than fast growing circuits. Table 3-2 on the next page shows that the collar county circuits now have two associate judges for every one circuit judge. Cook County was almost even in 1989, but added 22 associates and no new circuit judges in 1990. The southernmost circuits show the greatest dominance of circuit judges, indicating that

Table 3-2

Authorized Circuit Judges and Associate Judges, State of Illinois (as of December 3, 1990)

Circuit(s)	Number of Counties	Circuit Judges	Associate Judges	Total	Percent Circuit Judges
Cook County	1	177	204	381	46 %
"Collar County" Circuits*	7	39	79	118	33 %
Southernmost Circuits**	37	62	38	100	62 %
Central Circuits***	30	54	39	93	58 %
Remaining Circuits (North & West)	27	60	54	114	53 %
State Totals	102	392	414	806	49 %

* The 12th, 16th, 18th and 19th Circuits, grouped together because they include counties adjacent to Cook.

* The 1st, 2nd, 3rd, 4th and 20th Circuits, part of the 5th Appellate District covering the southern part of the state.

*** The 5th, 6th, 7th, 8th and 11th Circuits, part of the 4th Appellate District.

workload does not justify more new associate positions. The tendency for less populous circuits to have a smaller proportion of associate judges is shown in Table 3-3. The larger the circuits, the higher the proportion of associate judges and the the lower the proportion of circuit judges.

Local Administration

In Illinois circuit courts, as noted above, the flexibility possible in judicial assignments is in sharp contrast with the tendency for judges to specialize for longer periods than their Canadian counterparts, and to travel less frequently outside the county or region in which they reside. The high degree of localism is reinforced by the county and circuit-based electoral system, and circuit-based appointment of associates. Localism is also reflected in the administration of the trial courts. Most nonjudicial trial court personnel are paid by the counties that make up the circuit. Supplies, equipment and courthouse space itself are provided by county governments. This pattern of trial court administration still exists in perhaps half the states in the United States, and it existed in some 40 out of 50 states less than twenty years ago. [See Baar, Separate but Subservient, II.A., ch. 1.] The conventional view that American state trial courts are administered by the judiciary has therefore been theory and not reality until very recent times.

Table 3-3

Authorized Circuit Judges and Associate Judges, State of Illinois, by Population of Circuit (as of December 3, 1990)

Circuit Population	Number of Counties	Circuit Judges	Associate Judges	Total	Percent Circuit Judges
Under 200,000 (Six Circuits)	29	51	32	83	61 %
200,-300,000 (Six Circuits)	39	67	45	112	60 %
300-400,000 (Seven Circuits)	30	77	81	158	49 %
Over 400,000 (Three Circuits)	4	197	256	453	43 %
State Total	102	392	414	806	49 %

Local budgetary and personnel systems present sensitive problems and challenges to the judiciary. American trial judges have always complained about having to go hat in hand to local county commissioners for funds necessary to operate the court. The process is seen as both compromising and appearing to compromise the judiciary's independence. Thus the chief circuit judge is in a position, as the judiciary's voice, to insulate the rest of the trial bench from the political process. And an active chief judge can press for changes. Thus the daily Southern Illinoisan of December 18, 1990 (the day I spent in the First Circuit) gave front page coverage to the chief judge's address to a county chamber of commerce, in which he "urged civic leaders in Union County to put parochialism aside and work with neighboring counties to improve court and jail facilities."

The frustrations of coping with tight local budgets may in fact be no greater than the frustrations of competing against the needs of twenty other circuits within a statewide judicial budget. The advantages of localism are most obvious in Illinois' wealthy and fast growing collar counties. In DuPage County, the old courthouse is being replaced by a sprawling modern complex. In the 19th Circuit, the court has been able to develop a wide range of administrative innovations with the financial support of the county board. The circuit's largest county has a modern caseflow management system, complete with computer support, that might not have been possible within a statewide system struggling to meet demands from over one hundred local courthouses.

Localism may also reinforce and extend the differences between American and Canadian trial courts. The individual calendars that have been at the heart of many successful American caseflow management systems work most effectively when judges remain in a single location. The circuit systems that Canadian courts have deemed so important to avoiding parochialism in judicial decisions require a master calendar that makes judges interchangeable, a system that has become comparatively inefficient. A hybrid system that combines the legal and administrative advantages of both approaches should be possible, but each country's management framework has tended to reinforce the dominant orientation of its courts.

Evaluation

Illinois has lived for a generation with its unified trial court, so it was impossible to ask participants themselves to compare its advantages or deficiencies with the previous multiplicity of courts. Consideration of three major criteria for evaluating trial court structure – accessibility, quality and efficiency – suggests that net gains have occurred from unification, but that the pioneering structural reforms leave fundamental problems still to be addressed.

Have Illinois' unified trial courts promoted or retarded access to justice? In geographical terms, local access to a judge has been maintained. While a resident judge may not be sitting in a small county every day, that individual or a colleague from elsewhere in the circuit can provide timely service at the county courthouse level. In all but Cook and DuPage Counties, a single central court office can provide a full range of judicial services.

Have Illinois' unified trial courts improved the quality of justice? While this criterion is the most difficult to measure, the overall response would have to be generally, even strongly, positive. The ability of a chief judge to assign judges throughout a circuit should mean not only that the most able and experienced judges would be available for particularly difficult cases, but also that judges with a more limited range of skills could be assigned to appropriate matters.

The clearest gains should be visible when comparing the current circuit courts with the earlier array of limited jurisdiction courts. Before unification, part-time judges and lay judges often handled a variety of low-dollar civil claims, local ordinance violations, traffic offences and misdemeanors. Today, these matters are handled by law-trained, full-time associates selected by circuit judges who have examined the results of a systematic bar poll, and have the incentive to ensure that the high volume work of their court is done effectively. At the same time, well qualified lawyers may have added incentive to apply for associate judgeships, given the opportunity for future elevation or more diverse assignments. Without detracting in any way from these benefits, however, it must be noted that other American jurisdictions have abolished part-time and lay judges by creating a single statewide limited jurisdiction trial court, not by consolidating general and limited jurisidiction courts into a single level trial court.

A discussion of the quality of justice in Illinois trial courts would seem incomplete to outsiders if it ignored the dramatic charges of corruption that have put the Cook County Circuit Court in national headlines. The best known but not the only scandal was termed Operation Greylord, and resulted by 1988 in the conviction of eleven judges, 38 attorneys, and 21 law enforcement officers and court staff. [Lockwood, II.C., pp. 159-70.] Corruption focused on traffic fines, which were small but so numerous that millions of dollars were generated by diverting fine money into private hands. The key player was Circuit Judge Richard LeFevour, who was Presiding Judge of the First Municipal District (Chicago) at the time of his trial, conviction and sentence of 12 years imprisonment. Five other circuit judges and five associate judges were also convicted, and sentenced to prison terms ranging from three to 15 years.

A unified court system should provide the means to deal internally with corruption on this scale. Yet it went on for several years, and the chief judge of the circuit court at the time is still the chief judge. There is evidence that he and other administrative judges did take action; the presiding judge of the criminal division himself had contacted the federal authorities who eventually prosecuted. Perhaps the sheer size of the Cook County Circuit Court precludes the level of accountability necessary to prevent persistent corrupt practices. On the other hand, however, it is clear that within Chicago, corrupt public and party officials have achieved more leverage in particular city wards, so that the dismantling of a large unified court structure may make some of the resulting fragments susceptible to even more protracted and entrenched corrupt practices.

Illinois' unified court system has in fact played a constructive role in the outcome of Greylord. One of the key figures in exposing the scandal was an associate judge from the First Circuit who went to Cook County for his annual six week assignment, observed the corrupt practices and cooperated with federal authorities to gather evidence against his fellow judges. And the subsequent Presiding Judge of Chicago's Traffic Court was capable enough to be elevated to a prestigious federal district court judgeship, showing how a unified trial court allows the appointment of able and respected individuals to sensitive positions.

Have Illinois' unified trial courts improved the administrative efficiency and effectiveness of the judicial process? Results here are again mixed. One would surmise that the average number of hours judges sit per day is higher now than it would have been a generation ago. Yet court delays are still extensive, and Illinois' performance is worse than many other states. Cook County has had perhaps the longest delays in civil cases anywhere in the United States (six years from filing to disposition, down from as long as eight years). While Cook faces unique difficulties, delays elsewhere – even in rural circuits – are troubling. The state's speedy trial rule in criminal cases requires that trials begin within five months, but exceptions are so common as to render the rule ineffective.

These comments should be taken neither as a blanket condemnation of the system nor as criticism of the efforts of talented and hard-working people within it. County-based funding and administration has allowed some circuits to provide justice high in quality and efficiency, and they stand as models for other jurisdictions in America and abroad. But the same system has forced other circuits to struggle against inadequate resources and a political climate hostile to principles of impartiality. In this context, trial court unification can provide a framework within which important gains can be made, but even more important objectives may remain to be achieved.

SOUTH DAKOTA

South Dakota is a large, sparsely populated agricultural state with 716,000 people occupying 77,000 square miles. Sioux Falls, in the southeastern end of the state, is the largest city at 100,000. The state capital, centrally located on the west bank of the Missouri River, is the town of Pierre (pronounced Peer), population 12,000. The Dakotas reached territorial status in 1861; North and South Dakota were admitted to the union as separate states in 1889. White settlement opened up after the American Civil War, but even today, the state's native population is among the country's largest; two of South Dakota's 66 counties lie entirely within the Pine Ridge and Rosebud Reservations in the southwest part of the state.

With a population too small to support a full time judge in most counties, South Dakota might have been expected to organize its trial courts more like those in Canadian provinces, and less like the fragmented and localized bodies that existed in Illinois before unification in 1964. In fact, immediately prior to unification, South Dakota's general jurisdiction Circuit Court had a total of 21 judges divided among ten circuits, each with two judges (except the 2nd Circuit in Sioux Falls, which had three). Nevertheless, the state still had a wide variety of local courts: District County Courts exercising probate and juvenile jurisdiction, and occasionally also civil jurisdiction below $1,000.; Municipal Courts in a few larger centres; and (as of 1970) 240 justices of the peace and 144 police magistrates.

In January 1963, a Court Study Commission created by the state legislature, with members drawn from both houses and the state bar, recommended creation of a unified court system with a two level trial court. Only the Circuit Court and Magistrate's Courts would remain under the Commission's plan. That recommendation was never enacted into law, but a 1966 constitutional amendment turned the old County Courts into District County Courts that were fewer in number. And a 1968 statute abolished all but three municipal courts and shifted their jurisdiction to the new District County Courts. [Hall, II.E., p. 3]

With a fresh cycle of constitutional reform in the early 1970's, a new Judicial Article was drafted which built on and expanded earlier recommendations. The new article was approved by almost a two-thirds majority of the voters in the November 1972 general election. Implementing legislation was passed quickly in the 1973 legislative session, and the reorganization took effect in January 1975.

The Judicial Article kept the Circuit Court as the court of general jurisdiction, and eliminated the District County Courts. The juvenile and probate jurisdiction of those courts was shifted to the Circuit Court. The new court was divided into nine circuits, one less than before. By 1976, the number of circuits was reduced to eight, ranging in size from one to 13 counties, and those circuits remain in place today.

The 1973 legislation authorized 37 circuit judgeships, replacing the previous 21 circuit judges, 19 district county judges, and three municipal judges. Which of the 43 would occupy the 37 remaining positions was left to the voters:

> *Most of the judges serving in the old system were candidates for the circuit judgeships in the 1974 election. Thus, the effect of the reorganization and election was to retain as circuit judges most former circuit judges and to elevate to the circuit court most of the former district county judges. [Hall, II.E., p. 4]*

While the intermediate trial court was abolished, successors to the former JPs and police magistrates persisted in a new albeit simplified form. The major judicial work would be in the hands of a much smaller number of full-time and part-time "law-trained magistrates". In addition, some part-time lay magistrates with more restricted powers were carried over, while most of the functions of the lay magistrates were incorporated into the work of the nonlawyer clerks of court, in their designation as clerk-magistrates.

What differentiated the pre-1972 courts with JPs and lay magistrates from their 1975 successors was not simply that a higher proportion of limited jurisdiction court work would be done by full-time law-trained officials. Equal or greater in importance was the fact that all lay, law-trained and clerk magistrates were made a part of the Circuit Court, subject to the administrative authority of the court and its presiding judge.

Thus the transition included not only formal constitutional and statutory changes, but also a rapid evolution in administrative operations. This can be seen in the steps taken beginning in 1975 by the 5th Judicial Circuit in northeast South Dakota. The 5th Circuit replaced 54 nonlawyer JPs and police magistrates with

> *...one full-time law-trained magistrate who was to serve the entire circuit, and eleven lay magistrates, most of whom were appointed from among the former justices of the peace and police magistrates. The transition ...proved difficult for many of the [lay] magistrates, and after a short trial period the presiding judge, with the approval of the supreme court, replaced all [of them with four part-time law-trained magistrates]. [Hall, II.E., p. 5]*

Even with these changes, the new unified trial court, with its two levels of judges, remains an anomaly, illustrated graphically in the annual reports of "The South Dakota Unified Judicial System." The first organization chart in the report actually shows both a Circuit Court and a second level of Magistrate Courts, the latter made up of both lay magistrates and law-trained magistrates. Elsewhere in the report these second level courts are referred to as "the magistrate division." [Benchmark *1989*, II.E., p. 9] In practice, the so-called Magistrate Courts have no separate administrative apparatus. The magistrates simply constitute another set of judicial officers within the Circuit Court, and under its administrative authority.

It is these administrative lines of authority that make the South Dakota court system highly unified. The Presiding Judges in each of the eight circuits are appointed by – and serve at the pleasure of – the Chief Justice of the state Supreme Court. In turn, the presiding judges appoint all magistrates, both lay and law-trained, with approval of the Supreme Court. Court administration is funded from state not local appropriations, so that clerks of court and clerk's office personnel are all state judicial branch employees. At the top of the administrative hierarchy is the State Court Administrator, who reports directly to the Chief Justice and serves at the pleasure of the state Supreme Court. This hierarchical administrative authority, combined with central budgeting, purchasing, information processing and personnel systems, contrasts sharply with Illinois, providing a different dimension to the unification of the South Dakota courts.

Circuit Judges and Magistrate Judges

As of October 1990, there are 36 circuit judges; the eight circuits have either five circuit judges or four circuit judges. There are also 17 law-trained magistrates, of whom seven are full-time and ten part-time (one part-time position was eliminated in 1990). Five circuits have two law-trained magistrates, while two circuits have three and the remaining circuit has one. Circuit judges are elected for eight year terms on a nonpartisan circuit wide ballot. In many cases, however, judges are initially appointed by the governor to fill a vacancy. Following another provision of the 1972 Judicial Article, the governor must choose from among two or more persons nominated by a Judicial Qualifications Commission. The voters are not so constrained, and could elect a judge rejected by the Commission.

The law-trained magistrates are appointed by the presiding judge of the circuit in which they sit. Full-time law-trained magistrates are appointed for a four-year renewable term; part-timers serve at the pleasure of the presiding judge. Lay magistrates, now usually clerks of court, are appointed by the presiding judge for an indefinite term.

The jurisdiction of law-trained magistrates is much narrower than that of associate judges in Illinois, and lay magistrates are restricted still further. The law-trained magistrates try misdemeanors, civil actions under U.S.$2,000., and small claims. They also conduct preliminary hearings for all criminal prosecutions, unless the district attorney chooses to ask the grand jury to indict. Lay magistrates can render judgment in civil actions under

U.S $2,000. only if the case is uncontested, and can accept pleas only to class-two misdemeanors (which have a maximum U.S.$200. fine and 30 days in jail). Lay magistrates can also issue warrants, set bail and appoint counsel.

Since 1975, the court system has continued to phase out lay magistrates who are not clerks of court or deputy clerks. Only eight remained by the end of 1990 (compared with 11 in 1987), and they work an average of one-third time. Clerk-magistrates now number 87 full-time and 46 part-time, reflecting the practice of designating every clerk of court, and roughly half the deputy court clerks, as clerk-magistrates.

Meanwhile, the law-trained magistrates have been increasingly separated from the administrative work of the clerk-magistrates. And despite their limited jurisdiction, law-trained magistrates have increasingly been integrated into the judicial work of the circuit courts. They routinely call themselves "Magistrate Judges," both when issuing notices to the bar and when running for the office of circuit judge.

My interviews suggest that law-trained magistrates are used primarily in more populated areas where case volumes are high enough to generate a steady diet of misdemeanors and small claims. Thus the predominantly rural 6th Judicial Circuit has five circuit judges and only one part-time law-trained magistrate. The circuit judges do all the travelling, and the law-trained magistrate sits in the circuit's only centre of population. In the 2nd Judicial Circuit in Sioux Falls, five circuit judges are assisted by two full-time law-trained magistrates, reflecting the ability of courts with a number of resident judges in the same location to sort out work more easily.

However, it is likely that practices vary in other circuits. An examination of the mileage travelled by judicial personnel in fiscal 1989 shows that law-trained magistrates in two circuits travelled more than any circuit judges in those circuits. The three law-trained magistrates who ran up the most mileage were all part-timers. This suggests that assignment practices in the 6th Judicial Circuit are quite different from those in other multicounty circuits.

The Presiding Judge in the 6th Circuit explained his practice in a way that highlights an important advantage of trial court unification. He noted that South Dakota statutes, in a reflection of continuing localism, require that a circuit judge be available to hold court at least once every two weeks in every county seat. (The legal requirement is two days each month; see S.D.C.L. 16-2-21.) Most counties in his circuit lack even half a day's court work over that period of time. The day I interviewed the presiding judge in his chambers at one p.m., he had already travelled to another county seat, conducted all pending business, and returned for the afternoon. At the same time, however, the judge emphasized that the work he dealt with included some matters beyond the jurisdiction of a law-trained magistrate. Rather than send both of them, the general jurisdiction judge could do all the work, as well as meet with court staff and review any administrative problems. At the same time, the low volume ensures that the circuit judge's work retains some variety.

A degree of flexibility can be found in an urban circuit as well. In Sioux Falls, the two full-time magistrate judges are assigned all the misdemeanors, relieving the five circuit judges of that group of high volume, repetitive cases. At the same time, because all seven judicial officers are members of the same court (sharing two floors of the same building), a circuit judge whose cases have collapsed or been completed may help out if the law-trained magistrate has a busy afternoon with a full list of misdemeanors.

What is the effect of the continuation of a two-level hierarchy of trial judges on the lower level judges? To what extent do morale problems cited by Canadian critics emerge in a unified trial court that retains two classes of judge? None surfaced in the two interviews I conducted with law-trained magistrates. The part-time magistrate judge in Pierre did have difficulty maintaining a law practice and spending three days a week sitting in court. But he explained that he enjoyed the work and had sought out the job, because he saw it as a stepping-stone to his candidacy for the circuit bench. In fact, he was then running for an open seat as circuit court judge, and a postcard he was sending to voters urged them to vote "for experience," adding that he had "NO BACKLOG – Court Calendar Current." A month later, he was elected.

One of the two full-time magistrate judges in Sioux Falls was a young former public defender who said that he found the work important and satisfying, and would be happy to remain in the position for the rest of his professional career. The other magistrate judge had in fact been in the position for over a decade.

It appears that promotions from magistrate judge to circuit judge are rare in South Dakota, in contrast to promotions from associate to circuit judge in Illinois. The eight-year terms of South Dakota circuit judges make it difficult to observe trends even over a 15-year period. Note, however, that the newly-created 8th Circuit judgeship went to the circuit's only full-time magistrate judge, following his endorsement by the Judicial Qualifications Commission.

The office of law-trained magistrate is still evolving, and has changed since its conception in 1975. Fifth Judicial Circuit Presiding Judge Philo Hall wrote in 1980 that the law-trained magistrates in his circuit were "selected from young lawyers who accept the work only until their professional development makes their time too valuable to continue the magistrate work." [Hall, II.E., p. 5] Yet a comparison of those sitting at the end of 1989 with those sitting in 1982 shows that seven of the current 17 law-trained magistrates held their positions in 1982 as well (one of the seven had moved from part-time to full-time). As the unified trial court develops, magistrate judge positions may come to be occupied for longer periods of time, by individuals making a career choice rather than looking for temporary work.

Because the magistrate judges do a great deal of criminal work, and some civil matters, the mix of cases that remains within the purview of the circuit judges is heavier on family matters. However, none of the three areas dominates a judge's sitting time. While a degree of specialization may occur in some circuits, it appears that the concept of a generalist judge remains strong in South Dakota.

The Administrative Culture of the South Dakota Courts

The sheer size difference between the Illinois and South Dakota courts presents the observer with a sense that the South Dakota courts are manageable and accessible. The new Chief Justice was not limited to statewide issues. The day after he was interviewed in Pierre, he and the state court administrator were in Sioux Falls, meeting judges and administrative personnel. The Minnehaha County Courthouse in Sioux Falls, now 30 years old, remains relatively modern and open in design. Judges' offices could be entered just off public hallways, and judges could be seen and even approached in public areas outside the courtrooms. The more manageable size of the South Dakota court system is reflected in its caseload statistics. In fiscal year 1989, there were 151 felony trials in the state circuit courts (119 jury trials and only 32 court trials). Yet in 34 of the state's 64 counties, not one felony trial took place. Only one trial occurred in 14 other counties, and only two trials in six others. The ten remaining counties thus had 83% of the state's felony trials; in fact, only three counties had more than ten felony trials.

These figures and impressions may suggest to the reader a more comfortable work style than that in busier jurisdictions. But closer observation strongly suggests that any reduction in the formality or stress of larger jurisdictions misses the effort and commitment of the South Dakota courts.

In considering the court system as a whole, one finds that the courts themselves administer a range of services left almost entirely to other departments of government in Canada. Court employees conduct presentence investigations and prepare presentence reports; design and supervise juvenile diversion programs; provide probation services to juvenile and adult offenders; handle offender-paid victim restitution; provide aftercare services to juveniles; and conduct divorce custody investigations. In Canadian provinces, these and comparable correctional and social service functions are outside the boundaries of court administration.

In examining trial court operations, one must arrive early at the Sioux Falls courthouse to see the judiciary's work begin. Court sessions start at 8:30 a.m. When I asked one circuit judge why the courts opened at that time, he responded that they would have started at 8 a.m., but the lawyers needed time to stop by their offices to pick up their files. When I expressed surprise that circuit judges expected a jury to sit for 6 to 6 1/2 hours a day, the response was that jurors were used to working eight hour days, and were critical of the courts for sitting shorter hours. The two magistrate judges had sent a memorandum to practicing attorneys the previous August instructing all "prosecutors, defense attorneys and defendants [to] be present at 8:00 a.m." for dispositional conferences, and that prosecutors "should be familiar with the file *before* arriving at the dispositional conference and be prepared to make a plea offer, if any, immediately; and in no event later than 8:15 a.m." [Italics in original.]

Note also that the circuit judges who keep these hours are among the most poorly paid general jurisdiction trial judges in the United States. On July 1, 1990, their salaries were raised to U.S.$60,423., putting them 49th out of 50 states. Full-time law-trained magistrates reach a maximum of U.S.$41,246., and part-timers earn up to U.S.$19.83 per hour. The state's Chief Justice earns U.S.$66,700.

Low salaries reflect South Dakota's fiscal conservatism. Public sector spending, and public services themselves, are held in check. But it appears that the existence of a statewide administrative apparatus has allowed the court system to operate effectively within those constraints. Computer technology had just begun to expand in 1989, focusing on criminal and traffic cases in the state's 13 largest counties. But by December 1989, three counties "were filing cases directly and using computer terminals in their courtrooms."

More important than technology, the court system's central administrative office has had the benefit of a small group of dedicated senior professionals for many years. These senior managers are current in their fields and conscientious in their work. Effective operating procedures are in place for functions such as fee and fine collection. As a result, potential problems have been addressed before becoming unmanageable. For example, increased delays or case backlogs in one circuit can be handled without creating a crisis in other locations.

Evaluation

How does South Dakota's unified trial court score on criteria of accessibility, quality and efficiency? The geographical accessibility of the circuit court is maintained by regular appearances of circuit judges in counties that have no resident judge, but there has been at least some reduction in the number of resident judges, since the previous 21 circuit and 19 district county judges were initially replaced by 37 circuit judges. While the jurisdiction of the visiting circuit judge is far greater than that of an earlier resident district county judge, local lawyers and citizens would be less likely to see a judge living in their community.

More tangible criticism of a decline in accessibility came immediately after unification "from many municipalities whose police and city officials felt that their community was being deprived of service. This criticism," Hall reported, "came largely as a result of the elimination of the justice of the peace and police magistrate courts." [II.E., p.8] The dispersion of part-time lay officials certainly provided more access for police and related law enforcement bodies, but ready access to individuals who combined legal authority with little legal education raises competing questions about the quality of justice services. Hall reiterated those in 1980:

> *The abuses of the justice of the peace system were probably one of the strongest arguments in favor disposof the "reform" of the courts. Any serious observer of the old justice of the peace courts and the present law-trained magistrate courts will agree that the public is now receiving better service from better-qualified judges in the type of cases previously handled by the justice of the peace. Very few complaints have been received in the last two years concerning the loss of the justices of the peace and police magistrates. [II.E., p.9]*

Thus would participants argue that the one area in which a clear decline in geographical accessibility to the courts has occurred – police access to lay magistrates – has been counterbalanced by an increase in the quality of the criminal intake process and misdemeanor adjudication.

South Dakota lawyers also criticized the quality of circuit judges after unification. Judge Hall reported "complaints . . . that some of the judges are not qualified" in his 1980 assessment:

> *Some lawyers have contended that they do not feel they can trust major litigation to trial before certain judges. These lawyers feel that their success in such a trial would be meaningless because the judge would be almost certain to get error into the record. All of the lawyers interviewed as to their complaints about South Dakota courts said that discussions as to the lack of ability of some judges are common to the South Dakota bar. [II.E., p.11]*

Hall argued that "[n]one of these complaints are justifiably attributed to the Unified Court System," but did suggest the need to appoint judges with more trial experience, and noted the difficulty of finding capable lawyers given the low judicial salaries and the need to campaign for election.

Yet in one respect, there may be an indirect link between unification and lawyers' perceptions of the uneven quality of the circuit bench. Along with trial court unification comes a variety of administrative reforms designed to handle a larger volume of cases in a manner consistent with principles of fairness. As a result, trial courts increasingly develop means of scheduling cases and assigning judges that are fair and equitable to both the judges and the litigating public. In the process, some old techniques may be abandoned that had allowed private counsel to choose their judge.

This very point was raised by a senior attorney in Sioux Falls, a former state senator. He praised the current operation of the circuit court, but also reminisced about the days when opposing lawyers would discuss which judge they thought could best handle their case, and then phone him up and set a trial date directly with him or his secretary.

Judge shopping is a traditional response to a bench of uneven quality, but has been subject to a variety of controls and limitations for many years in most jurisdictions. If allowing parties to choose their judge is unacceptable, as a matter of fairness even more than a matter of efficiency, the courts and the appointing authorities have even greater responsibility to ensure that judges with insufficient strength in some areas of the law or insufficient experience in some types of proceedings can improve their skills and acquire experience without adding to the costs faced by litigants.

In summary, changes in both accessibility and quality have followed trial court unification in South Dakota. However, as in Illinois, the most significant changes have come less from the creation of a single trial court than from the professionalization of judicial officers who deal with low-penalty, low-dollar disputes. And this replacement of lay magistrates in local courts with law-trained magistrate judges in a state administered court parallels in key respects the development of Provincial Courts in Canada over the past twenty years.

Further parallels could be made between the evolution of Canadian courts and those in South Dakota. The circuit court in South Dakota was created by merging the earlier circuit court with a county and district based court of intermediate jurisdiction, just as Canadian superior courts have emerged (thusfar in eight provinces) from merging central trial courts that did considerable travelling with locally-based county and district courts. Where the evolution diverges is that in South Dakota, merger occurred along with the professionalization of lay magistrates, as part of a single reform package, so the two classes of judges were linked administratively under a common set of presiding judges, under the common authority of the state chief justice. By contrast, Canadian provinces made statutory changes at different times, evolving two separate groups of judges with their own chief and senior judges, and sharply separated courts. It appears that in the eventual result, South Dakota has a form of trial court organization that is more tightly coupled at the local and regional level.

Let us examine finally whether unification of South Dakota's trial court has promoted efficiency. This task is facilitated by data on case filings and other workload measures available from annual reports covering the years from 1979 to 1989. Some key indicators of caseload and workload are summarized in Table 3-4 on the next page. Numbers are shown for three years at the beginning, middle and end, and the last column shows the highest total (if that total was not shown in an earlier column).

Taken together, the figures show a mix of increases, decreases and relatively stable figures. Civil filings have grown relatively slowly, divorce filings have remained remarkably stable, small claims grew and then levelled off, and all classes of criminal filings have increased. But these overall figures may not be good indicators of changes in the workload of circuit and magistrate judges. Therefore we should focus on changes in the number of trials and contested matters. Doing so reveals a pattern almost the reverse of the changes in filings. Civil and family work are both up sharply; while contested small claims have levelled off, they still doubled over the eleven year period. These large increases in workload contrast with sharp reductions in trials of felonies and serious misdemeanors, and no change in minor misdemeanor trials; note however the growth that has occurred in felony preliminaries.

The net growth in trials, hearings and contested matters is evident in matters within the jurisdiction of both circuit judges (most civil, divorce and felonies) and magistrate judges (small claims, misdemeanors, and civil matters up to U.S.$2,000.). Yet the South Dakota judiciary has not grown in size at all. In 1973, unified trial court legislation authorized 37 judges; the number was reduced by one in 1975 and again in 1984, and increased by one in July 1989. Thus there has been no change in the size of the circuit bench during the entire period covered in Table 3-4.

Figures for law-trained magistrates were not available for the 1970's; Hall's discussion of the 5th Judicial Circuit quoted above suggests that sharp fluctuations must have occurred. However, by 1981, there were 17 law-trained magistrates (six full-time and eleven part-time). One part-time position was left vacant from 1982-84, another full-time position was later created, but a part-time position was eliminated in 1990. Thus there

Table 3-4

Caseload and Workload Changes, South Dakota Circuit Courts, 1979-89

Category	FY 1979	FY 1984	FY 1989	Highest Year
Civil filings	8,379*	10,686	10,547	12,027 (FY87)
Civil trials and disposition hrgs	1,087	1,826	2,716**	
Divorce filings	3,126*	3,216	3,373	3,544 (FY81)
Divorce trials and related hearings	n.a.	1,138	2,254	2,293 (FY88)
Small Claims filings	13,014*	19,259	19,640	21,814 (FY86)
Small Claims Contested	1,104*	2,288	2,491	2,862 (FY86)
Class 2 Misdemeanors				
Filings	122,126	130,520	160,068**	
Trials	2,281	1,439*	2,269	2,758 (FY82)
Class 1 Misdemeanors				
Filings	9,148	15,192**	13,528	
Trials	459	310	234	502 (FY82)
Felonies				
Filings***	2,337*	2,606	3,967**	
Preliminary Hearings	688	704	954	1,055 (FY88)
Trials	215	160	151*	270 (FY81)

Notes:

"Civil" matters exclude small claims.
*Denotes lowest number over eleven year period.
**Denotes highest number over eleven year period.
n.a. = Not available (category not reported at that time).
***Prior to 1986, felony filings did not include unterminated cases.

are still 17 law-trained magistrates today. Staffing allocation figures show that the actual hours law-trained magistrates have worked has increased in that period – from 10.4 FTEs in fiscal year 1982 to 11.9 FTEs in fiscal 1985 and 12.2 FTEs in fiscal years 1988 and 1989. Some growth has taken place here, but the overall increase in judicial time is marginal.

In summary, South Dakota's unified trial court has been able to absorb a substantial net increase in judicial workload without any increase in judicial personnel, and only a marginal increase in judicial time. The court's ability to do so may be attributable to generosity on the part of the 1973 legislature in allocating sufficient judicial personnel to allow for workload growth. But the South Dakota legislature is not known for its generosity, so the ability of the trial court to do more work with virtually the same numbers on the bench is a credit to its efficiency.

At the same time, because this positive conclusion is based on quantitative data, it must be made with caution and with qualifications. Court statistics in any jurisdiction face problems of validity. If for example, participants know that trials are considered a key measure of workload, the numbers could be inflated by local reporting practices that transform a meeting in chambers to a trial. And even in a state like South Dakota, where court statistics are collected by personnel within a single administrative system, the numbers reflect diverse local practices. Review of South Dakota's criminal statistics suggests for example that some counties may be reporting each charge against the same individual as a separate case, presumably reflecting prosecutorial practice within the county.

The judicial system annual reports provide no data on trial delays or the aging of cases or the elapsed time for different types of cases. So it is not possible to analyze in quantitative terms whether the unified trial court has been effective in reducing delay. Impressionistic evidence from interviews with both state and local court officials suggests that some problems exist; Rapid City in the western part of the state, South Dakota's second largest city, showed increased delays, and was receiving attention from Pierre.

Yet Sioux Falls could point proudly to reductions in the elapsed times for disposition of civil cases. A civil caseload review prepared in February 1989 by the trial court administrator showed the median time from filing to disposition for 247 civil cases assigned to judges and completed in 1988 was just over a year. This is an impressive performance, because the 247 cases were only a small portion of total annual civil filings (over 3000 in 1987); 226 of them were cases in which a certificate of readiness was filed. Yet within less than two years, a civil case review for fiscal year 1990 showed marked improvement. Sixty-seven percent of the new year's 243 cases were completed within a year of filing, and 71.6% reached disposition within six months of the certificate of readiness (up from 57% in the previous survey).

It could be expected that South Dakota's small dispersed population might add to potential trial delays by increasing the difficulty of assembling jury panels, a task done continuously and hence more expeditiously in large urban courts. Yet while South Dakota courts are not known to be exceptionally fast by American standards, available evidence suggests they have been able to maintain reasonable waiting times for trial. And the operation of the unified trial court, reinforced by a state-level administrative capability, has contributed to the overall effectiveness of the court system.

Chapter Four

The One-Level Trial Court in Minnesota

Interesting and diverse as the Illinois and South Dakota courts are, understanding their experience is less important to this report than learning about the Minnesota courts. For Minnesota is the only one of these three to aim for a "pure" one level trial court with only one class of judicial officer. Furthermore, for the most part, Minnesota has achieved that goal. From one end of the state to the other, the same judges who conduct civil and criminal jury trials also sit in traffic court.

Minnesota's trial courts are the most recent in the United States to unify. They did so over a lengthy period, from 1983 to 1987, through a unique process termed "voluntary unification" whereby each of the state's ten judicial districts was authorized to develop its own distinctive "merger plan." And even before this unification process began, the Minnesota courts had been reformed and reorganized for two decades or more. Thus, unlike Illinois and South Dakota, Minnesota was not constructing a trial court from numerous fragmented local courts and judicial officers. It was building on an already simplified, professionalized and partially integrated two-level trial court system.

The recent vintage of Minnesota's unified one-level trial courts makes it impossible to assess the longer term consequences of structural reform in that state. However, it should be possible to understand more clearly the issues that were raised during the unification process, and to explore current problems that some participants attribute to unification. The ability to do so was enhanced by the cooperation of Minnesota judges and court administrators. During a week in the state, it was possible to meet with the state court administrator and senior officials in her office, four members of the seven-judge state Supreme Court, a number of judges and administrators in both Minneapolis and St. Paul, and judicial district administrators in two other districts. Judges in a fifth district were interviewed by telephone, as was the current president of the State Bar Association.

CONTEXT AND HISTORY OF COURT UNIFICATION

The state of Minnesota has a population of 4,352,000, spread through 87 counties that cover 84,068 square miles, a larger area than either Illinois or South Dakota, and 12th among the 50 states. Admitted to the union in 1858, Minnesota began as an agricultural state until the growth of mining at the end of the nineteenth century, and manufacturing and commerce in the twentieth. Agriculture was still dominant until World War II, but rural population has declined and urban and suburban population has grown. Well over two million people – half the state's population – live in the Minneapolis-St. Paul metropolitan area, covering Hennepin County (Minneapolis, the state's largest city) and Ramsey County (St. Paul, the state capital); the surrounding counties have also experienced rapid growth.

By the end of World War II, Minnesota's trial courts looked essentially as they had since the beginning of the twentieth century. The general jurisdiction trial court was the District Court, organized into 19 judicial districts. The constitution also provided for justices of the peace, probate courts, and other inferior courts established by the legislature – in practice, a number of municipal courts. [Pirsig, II.D., pp. 820, 828] As early as 1941, the Minnesota Judicial Council appointed a Committee on the Unification of the Courts that recommended a simplified two-tier trial court system, with a district court and a county court. No action was taken, and even the 1956 constitutional amendment about which Pirsig wrote was less far reaching.

By the early 1970's, the simplified two-tier system had been established. The District Court had been reorganized into ten rather than 19 districts, eliminating seven districts that by 1956 had only one judge. Although justices of the peace were not abolished until 1977, they were effectively replaced by full-time law-trained judges in 1971, when the second tier courts were rationalized by creation of a limited jurisdiction court in each county. The new courts were called County Courts in 85 counties, and Municipal Courts in the two most urbanized counties, Hennepin and Ramsey. The state court administrator's office was well established, though trial courts were staffed and funded by the counties.

Other innovations had been pioneered in Minnesota; for example, Hennepin County created family court referees within the District Court to provide specialized expertise in family law matters. Both district and county court judges ran in nonpartisan elections; in practice, however, most judges joined their courts as they still do today, by appointment of the governor.

Reform of the trial courts did not stop with the establishment of a professional county court bench. Steps were taken to integrate county and district courts administratively, even though they remained distinct courts with separate sets of judges. By the late 1970's, the separate chief judge's position in each county and municipal court was abolished. Instead, each of the ten judicial districts had a chief judge and an assistant chief judge elected by a combination of the district and county/municipal court judges within the district. The chief judge would be a district court judge, and the assistant chief was required to be a county or municipal court judge.

Another step was taken that brought the two courts closer to unification. County courts were made district wide bodies, rather than having one court per county. (The two municipal courts were already district wide, since Hennepin and Ramsey Counties were large enough that each one constituted a judicial district.) This change not only meant that counties with small caseloads could share a single county judge, but also changed the electoral base of the county court judges. Henceforth, they would be elected district wide, as were the district court judges.

The county and municipal court judges continued to press for merger of the two trial court levels. The district court judges fought to maintain the two trial courts. By the late 1970's, the volume and visibility of court reform legislation was great enough that state legislators acquired more than the usual expertise on the topic, increasing the likelihood of legislative intervention. Furthermore, justices on the state supreme court became more active. In most states, only the chief justice is involved in developing court administrative policy, but in Minnesota he was joined by an associate justice, Lawrence R. Yetka, who chaired a Select Committee on the State Judicial System appointed by the chief justice under the auspices of the state Judicial Council. [Tennessen, II.D., p. 6]

In 1980, the governor appointed a new chief justice, Douglas Amdahl, then the chief judge of the Hennepin County District Court, the largest trial court in the state. Amdahl had been a public opponent of merging the district and county/municipal courts, but he reversed his position after becoming chief justice. He not only presided over unification of the two trial courts, but by the end of the decade became chair of the American Bar Association Committee on Standards of Judicial Administration – the committee whose 1990 standards reiterated support for a one-level trial court.

The next step toward a single trial court was taken in 1982 by the Minnesota State Legislature. Rather than mandate unification throughout the state, it authorized each judicial district to create "one general trial court of the judicial district to be known as the district court." The judicial district reorganization could only be accomplished by a majority vote of the district judges and a separate majority vote of the county or municipal judges in the district. The reorganization would take effect a year "following certification to the secretary of state"; the time period was subsequently accelerated to three months for four of the ten districts. [Minnesota Statutes 487.191, based on 1982 c. 398, s. 8] Certification took the form of filing a unification or merger plan. These ranged in size from nine lines to six typewritten pages. Because plans could vary, each district that chose to combine its two trial courts into one had broad discretion to implement unification as it wished.

If most district court judges opposed unification, how would it be achieved? Under what conditions would a majority of district judges within a single judicial district "volunteer" to unify? The statute encouraged unification for two reasons. First, the district judges knew that support for mandatory statewide unification was strong enough in the legislature – and would have the endorsement of the state supreme court – that a one-level trial court was likely to emerge even over their opposition. Second, agreement on a local plan would allow the district judges to negotiate more favourable terms. In practice, the most common outcome was that the two trial courts would be merged, but the sitting district court judges would not be required to sit on matters formerly within the jurisdiction of the county and municipal court judges. The county and municipal judges were usually willing to consent to this provision on the assumption that their work would gradually become more varied as new appointments were made, so the sooner unification took place, the more quickly they would enjoy the benefits.

The first district to unify was perhaps the most diverse, the Tenth Judicial District, covering an eight-county area from fast-growing suburbs surrounding the Twin Cities north to rural areas along the Wisconsin border. The resolution filed January 11, 1983, approved merger and then included a number of "terms and conditions" that would come to be referred to as "grandparenting":

That any District Court Judge sitting as a District Court Judge on July 1, 1982, and during that Judge's tenure in office, shall not be required to preside over any matter the jurisdiction of which is with the County Court as of June 30, 1982.... The District Court Judge shall preside over any concurrent jurisdictional matter and any gross misdemeanor and any actions at law in which the amount in controversy exceeds $5,000, except proceedings for dissolution, annulment and legal separation, and other actions related thereto; proceedings under the Reciprocal Enforcement of Support Act; proceedings for adoption and change of name; and proceedings for the determination of paternity or parentage of and establishment and enforcement of child support payments for an illegitimate child. A District Court Judge sitting as of July 1, 1982, may hear any traditional county court matter only with that Judge's consent.

That any County Court Judge sitting as a County Court Judge on January 7, 1983, shall not be required to preside over any matter jurisdiction of which is with the District Court as of June 30, 1982. The County Court Judge shall preside over any concurrent jurisdictional matter and any gross misdemeanor and any actions at law in which the amount in controversy does not exceed $15,000. That any County Court Judge in office as of January 7, 1983, may hear any traditional District Court matter only with that Judge's consent.

That any person assuming a District Court judicial position or a County Court judicial position after January 7, 1983, shall preside over any matter in any court as that Judge may be so assigned...

No amendment of this Resolution shall be valid, nor shall it alter the rights, duties and obliga-tions of the District Court Judges or County Court Judges, sitting as of January 7,1983, as those rights, duties and obligations are outlined herein...

The provisions in the Tenth District resolution are reciprocal. Incumbents from both existing courts are grandparented, and both are authorized to hear all cases. The provisions are reinforced not only by the clause prohibiting amendments, but by the initial reference to "tenure in office," designed to ensure that grandparent rights carry over to an incumbent's new term following reelection. At the same time, the provisions are not symmetrical, since district court judges were more likely to invoke them than county court judges. Not all district judges in the Tenth invoked their grandparent rights under the resolution. A number of them accepted regular assignments to county court matters. At least one judge who refused to accept assignments still sat on county court matters when requested to do so on an emergency basis.

The provisions are also interesting for what they suggest about judicial perceptions of desirable work. Civil and criminal work are divided by dollar amount and potential penalties, but all family work was classified as a "traditional county court matter," and this was reinforced by two additional provisions designed to leave no doubt that incumbent district court judges wanted no part of any family law matters.

How effective was unification in the Tenth District? Participants believed the benefits were substantial. Within a year, Jane Morrow, the Clerk of Courts in Anoka County (the most populous county in the district), argued that statistical data from the Supreme Court's State Judicial Information System

strongly supports the contentions of proponents of court consolidation; that consolidation results in dramatic improvements in trial calendar currency. The data concludes that the district providing the most expeditious judicial service to the public is the unified Tenth Judicial District.

The public importance of trial court consolidation, she concluded, "arises out of the connection between consolidation and the improvement in providing judicial services to the public."

THE CONSOLIDATION STUDY COMMISSION

Before the next unification plan was filed in November 1983, the governor signed a bill creating the Court Consolidation Study Commission to "determine whether it would be desirable to unify the current" trial courts. The 16-member commission consisted of eight state legislators (four from each house), five judges (two from the district court, two from the county court, and one from the state supreme court), and three public members (two attorneys and one clerk of court, Jane Morrow from Anoka). One of the attorneys, A. M. Sandy Keith, was named chair. Keith was a respected lawyer from Rochester, Minnesota, home of the Mayo Clinic, and succeeded U.S. Supreme Court Justice Harry Blackmun as Mayo's chief counsel; he was also a prominent Democratic Party politician and former statewide office holder.

The commission's brief report in February 1984 recommended mandatory consolidation of the district and county/municipal courts as of July 1, 1985. While its fifth and final recommendation was that "[e]ach district in the state should be allowed to proceed with a unified plan which would reflect its own particular problems and history," the commission also "unanimously recommend[ed] that the implementing legislation contain no provision to permit the grandfathering in of certain judges." Thus the commission's preference for a uniform one-level system was clearly expressed; its bow to diversity would not have permitted district plans to include the one provision most useful in gaining agreement between supporters and opponents of unification.

The commission's nine-page majority report was accompanied by ten pages of minority reports and supplementary comments. The key minority report suggests that support for mandatory one-level trial courts reflected the views of a slim majority of the committee, who chose that position over a competing model of a "unified trial court... served by two divisions of judges." This compromise position was outlined by State Rep. Richard Cohen of St. Paul, and his minority report was signed by Duluth District Judge Charles Barnes. Under the two-division proposal:

> *Division I judges will have original jurisdiction in all civil and criminal actions. Division II judges will have exclusive jurisdiction in all juvenile and probate proceedings and will exercise jurisdiction over conciliation court [small claims], traffic and ordinance violations.*

The proposal also ensures that "Division II judges will have concurrent jurisdiction with Division I judges in all civil and criminal matters as provided by rule of Supreme Court." [Underlining in original.]

The minority position is an interesting variation on the Illinois and South Dakota systems. Once again, work deemed less desirable is shifted to second-division judges within the context of a single trial court. Under this plan, those advocating unification for administrative purposes, such as Morrow in her description of the gains in the Tenth District, would have their single court, but general jurisdiction judges would not be bogged down with what Minnesotans distinctively and elegantly label "scut work." At the same time, the division of work proposed by the minority report focuses more on subject-matter specialization than on the distinction between high-dollar, high-penalty cases and low-dollar, low-penalty cases. Thus all criminal matters including "petty misdemeanors" would be placed in the district court, making it a unified criminal court, with traffic and municipal ordinance violations – akin to Canadian "provincial offences" – in Division II. Juvenile court matters, often found in superior courts in the United States (California is a conspicuous example), are placed in Division II, as they surely would be if two divisions of judges were created in a single Canadian trial court.

The minority report indicates that a December 19 commission meeting "approved the concept of a single tier district court" although the two-division plan was supported by seven members. This suggests a very tight split, in which the vote would have been 8-7, with the chair supporting the majority, since he could have created a tie and prevented approval. The split broke along expected lines. The two district court judges supported two divisions, the two county court judges supported a single tier. The state supreme court justice voted with the district court judges in support of the compromise position. The state representatives split 2-2, and the state senators voted 3-1 for single tier. The remaining lawyer supported two tiers and the court clerk one.

The strong position that emerged from the tight commission vote suggests that unification supporters were not required to compromise in order to secure a majority for statewide adoption of one-level courts. Under these conditions, the nine remaining districts may have realized the value of a negotiated rather than a mandated unification. As a result, the "voluntary" process continued without the commission's primary recommendation ever being passed into law. Most districts emulated versions of the grandparent clause of the Tenth; only the First and Third Districts in southeastern Minnesota made no divisions among currently sitting judges.

The most direct challenge to the one-level concept came from the Sixth and Ninth Judicial Districts in the northern part of the state. Easily the largest district geographically, the 17-county Ninth covers the entire northwest quadrant of the state along the Manitoba and Ontario borders, including Lake of the Woods and the headwaters of the Mississippi. The four-county Sixth District is centred in Duluth and extends north to Minnesota's Iron Range. Most observers throughout the state felt that whatever the shortcomings of a one-level trial court in metropolitan counties like Hennepin and Ramsey, the sprawling Ninth would reap the greatest benefits through saving "windshield time." For example, under unification a district judge would not have to drive across two large counties in the state's coldest winter weather to give formal approval to the resolution of a matter beyond the jurisdiction of a county judge. Yet the Ninth District's unification plan, filed July 1, 1984, created one trial court – with two divisions corresponding generally to those in Rep. Cohen's minority report. Thus district court judges would become Division I district court judges, and county court judges would become Division II district court judges. Furthermore, this divisional split applied not only to incumbents, but also "in all its terms upon each judge of the district and his/her successors." Thus any future candidates for judicial office would be required to designate whether they were seeking a Division I or Division II judgeship.

A year later, the Sixth District filed a similar plan for perpetuating two classes of judges. However, the plan was challenged, and an Attorney General's opinion held it invalid under the state statute because of the requirement that Division II judges be elected from districts smaller than those of Division I judges. The Sixth District then submitted an "Amended Unification Plan" that essentially adopted the grandparenting provisions used in other districts. The Ninth District never submitted any revisions, but never implemented the two tier distinction. In practice, the Ninth is the only remaining district where grandparent clauses are still invoked, suggesting the depth of opposition in that part of the state.

The study commission report dealt also with two issues that are central to understanding the operation and impact of a one-level trial court, and have been an important part of the debate in Canada. The first involves criminal appeals. Before the drive to unification began in Minnesota, criminal appeals went from the trial court to the state supreme court, regardless of whether the appeal was from a felony conviction in district court or a misdemeanor conviction in county or municipal court. Caseload pressures on the state supreme court, particularly the growth of appeals from the Hennepin County Municipal Court, led to proposals that appeals from that court should be heard by a three-judge panel of the Hennepin County District Court. Those proposals were adopted, relieving the state's final appellate court of a number of appeals from misdemeanor convictions. In turn, however, as support for a unified one-level court proceeded, opponents pointed out that unification would mean the court trying misdemeanor cases and the court hearing appeals from those cases would be the same, and would draw its judges from the same pool. Either that or appeals would move back to the state supreme court, recreating the previous problems of that court.

A similar anomaly has been raised by opponents of a unified criminal court in Canada. Since appeals in summary conviction matters (our equivalent to misdemeanors) are now heard by a single superior court judge, under a unified criminal court a summary conviction appeal would be heard by a judge of the same court (and the same rank) as the trial judge. Supporters of the unified criminal court consider this a side issue, and argue that it would be possible for an appeal to be heard by the same court that tried the case, a common practice in Australian superior courts today, and in Canada before appellate benches were separated from trial benches in the provincial superior courts. While these supporters are correct that the problem is neither insoluble nor fundamental, opponents are justified in seizing on the problem as an example of an increased cost that could derive from a one-level criminal court. For example, summary conviction appeals under a unified criminal court in Ontario could be handled by panels of three trial court judges, increasing cost per case, or by a single judge of the court of appeal, increasing travel costs for either the judge or the parties. Furthermore, ministry documents presented by the Ontario Attorney General indicate that shifting summary conviction appeals to the provincial court of appeal could require increasing that bench to more than 30 judges.

In Minnesota, this issue was moot before the Consolidation Study Commission issued its report, because in 1983 an intermediate appellate court, the Minnesota Court of Appeal, was added to the state court system. The new court of appeal was created once it was apparent that case pressure on the state supreme court would continue as population and commercial activity expanded. Once the new court was in operation, misdemeanor as well as felony appeals went directly there, altering the role of the state supreme court and eliminating a practical difficulty confronting advocates of one-level trial courts. In Canada, the issue of summary conviction appeals is still very much alive, because the Ontario government has refused to support an intermediate court of appeal for the province even as it advocates a unified criminal court.

The second issue raised in the study commission document centres on the concept that the quality and equality of justice require equality among trial judges. This idea moves beyond allegations that opposition to one-level trial courts derives from self-interest of superior court judges: a desire to maintain higher status, a more exclusive title and a more restricted workload. The next step in that argument is often an assertion that superior court judges should put aside those concerns in the interests of a more efficient system of adjudication. The equality concept is somewhat different. It argues that by differentiating cases and assigning them to different classes of judges – one subordinate to the other in the judicial hierarchy, and commonly paid a lower salary – the litigants themselves are being deprived of equal justice.

The basic premise of the equality argument was stated in one minority report as a general proposition accepted by all:

> *All cases are important to society, be they a DWI [impaired driving] or murder case, a child custody or dissolution case, and a landlord/tenant or class action securities case.*

If so, argue proponents of unification, why maintain two divisions as "a caste system not unlike the present two-tier court"? If cases are equally important, should they not be tried by judges equal in rank and salary?

Here the contending arguments fall into a dispute over who has the burden of persuasion. If the equal importance of all cases is basic, argue proponents, trial judges should be equal in rank and salary, and opponents have the burden of demonstrating why two levels need be retained. In contrast, two commissioners opposed to one-level courts suggest that it is those who propose change who have the burden of persuading us that a unified one-level trial court "will promote better justice for Minnesota."

The commissioners making this argument also stated as a general proposition that "[j]udges, regardless of the tier in which they serve, have similar qualifications and are of equal competence." This proposition puts supporters of unification in a bind. If they accept it, unification may not be a necessary condition for equal justice. If judges are equally qualified and competent in both tiers, then for example "full implementation of cross assignment and centralized scheduling, even without formal consolidation, can accomplish the stated goal of those favoring unification – more efficient use of judicial resources." If supporters reject this proposition, saying that equal rank and salary are necessary, have they then conceded that lower status and lower salaries lead to a county court bench that is less well qualified and less competent, a concession that could raise concerns about the appropriateness of merging the two courts?

There is one aspect of the equality issue on which commission members were in full agreement:

> *In analyzing the systems in other states and in analyzing what has occurred in Hennepin and Ramsey Counties, the Commission recognized that a unified system may attempt to utilize parajudicial personnel to handle routine or otherwise "undesirable" types of cases. Considerable debate ensued over whether the Minnesota judicial system should allow expanded use of parajudicial personnel. The Commission was unanimous in its belief that such a situation not be allowed to occur. The Commission also expressed concern over those states having one trial court, but with two or three levels of judges. Again, there was almost unanimous opinion that this should not occur in Minnesota.*

The commission's fourth recommendation therefore "cautioned" the legislature not to permit "the expanded use of referees and judicial officers under a consolidated court system" in order to avoid "the potential growth of classes of judges."

In short, whether commission members favoured a one-level court or a two-level court, they agreed that a one-level court should not be created if the next step was the expansion of a new class of subordinate judicial officers. This suggests a general acceptance of the concept that because all cases are important, they should be handled by judges equal at least in qualifications and competence, and perhaps in rank and salary as well. Whether this is a logical argument or a realistic one will receive further consideration in Chapter Five. What should be observed at this point is that the dominance of managerial and efficiency arguments in the discourse on court structural reform should not obscure fundamental issues of how we define and measure the quality of justice.

The Court Consolidation Study Commission was an important step in the unification process, not because of any legislative results, but because it signaled continued support for a one-level trial court. By the time the commission's report was released, two more districts had filed unification plans, one with a grandparent provision and one without. The plan without grandparenting (the Third District in southeastern Minnesota) did however include language making all sitting district judges senior to all sitting county judges "[i]n all situations where decisions, rights or privileges shall depend upon judicial seniority within the district." The Third District plan also contained a requirement unusual in American court rules: "No judge will provide more than 80% of the judicial service in any one county." The need to ensure litigants within a county that they can obtain the services of an alternative adjudicator has long been built into Canadian practice, but is not as universal in the United States.

The tenth and last plan was filed on September 8, 1986, by the Fifth District in rural southwestern Minnesota. Four other plans – including those covering Minneapolis and St. Paul – had been filed within the previous six months. Thus on September 8, 1987, the unification process was complete. Minnesota had a single trial court, staffed entirely by district judges. In theory. Before evaluating the impact of the unified trial court, however, it is essential that we examine both the impressive degree of success the court system has had in maintaining a one-level trial court, and the important exceptions to the judicial equality principle that still remain.

ONE-LEVEL COURTS IN OPERATION

In 84 of Minnesota's 87 counties, the single trial court is staffed by district court judges and by no other judicial officers. The chief explanation for the absence of other judicial officers is that no district can appoint parajudicial personnel without approval of the state supreme court. While trial court budgets are funded by county government, the state supreme court has used its rule-making power to ensure that individual districts cannot reintroduce a second tier of judicial decision makers even if county authorities are willing to pay the cost.

The only exception in these 84 counties is a temporary one. The judges in a district may appoint a court referee on a temporary basis with the permission of the state supreme court – if the district's caseload has increased but that increase has not yet been reflected in the creation of an additional permanent district judgeship. The key to this process is the weighted caseload, a statistical formula whereby different types of cases are given different "case weights" or values, based upon previous studies of how much court time cases require for disposition and what proportion of particular case types go to trial, settle just before trial, or are processed with little or no actual court time. The case weights are subject to periodic review and revision by the state court administrator's office, and are designed to avoid practices that local trial courts have used in other jurisdictions (including the federal courts) to enlarge their numbers artificially. The weighted caseload enhances the ability of the judicial branch to plan for the trial courts as a whole, as well as control the growth of parajudicial personnel.

The development of the weighted caseload has given the courts a method of making an effective case to the legislature for more judgeships in high growth districts. At the same time, however, the legislature has established a policy that requires the judicial branch to evaluate judgeship needs before a vacancy can be filled for an existing judicial position. Thus if a vacancy occurs in a district whose weighted caseload no longer requires as many judgeships, the state supreme court has the authority to order the vacant judgeship shifted to another district. Failure to do so would jeopardize legislative approval of additional judgeships, on the grounds that the judicial branch allowed an unnecessary position to be filled at the taxpayer's expense. While this policy seems to be a thoughtful response to the need to reduce government spending, and it wisely recognizes that the decision to shift a judgeship should be made by those within the court system, it has placed new pressures on statewide judicial branch officials. The recent removal of a judgeship from the Fifth District, based on weighted caseload figures that reflected the district's declining population, was challenged in a hearing in which the district extensively documented its continuing needs, and even challenged the accuracy of some of the caseload calculations. On more than one occasion, I heard complaints that the weighted caseload did not adequately incorporate "windshield time"—the reality that judges in less populated counties had travel requirements not comparable to those in urban districts.

Even if referees were nominally temporary, they could grow in number and their terms of office could grow in duration if the legislature was not also responsive to the judiciary's requests. The legislature's record has generally been good in recent years, when Democrats controlled both the legislature and governorship; whether the same pattern will occur following the election of a Republican governor in November 1990 is problematic. Judgeship figures reflect this situation. When the study commission reported in February 1984, it counted 86 district judges, 103 county judges and 28 municipal judges (Hennepin and Ramsey Counties only), 217 judges in all. By 1987, the figure was up to 224; by 1989 it was 237, and by the end of 1990 it stood at 241. The 1991 legislative session, however, approved only one of 12 judgeship requests.

What about the three counties out of 87 that were excluded from the broad statement at the opening of this section? One, St. Louis County, has a single judicial officer sitting in Duluth, who hears family and juvenile matters. The position was carried over from before unification. The other two counties are more significant exclusions, since they are the state's two most populous counties, Hennepin (the Fourth District) and Ramsey (the Second District). There are currently 54 district judges in Hennepin and 24 in Ramsey, but in both counties, there had been a variety of parajudicial personnel prior to unification, including conciliation court judges (lawyers who preside in small claims actions on a part-time basis) and family court referees (lawyers who are appointed full-time to handle family law matters). Both counties have also developed court-annexed arbitration programs that use volunteer lawyers.

The Hennepin judicial district administrator indicates that his court currently has 15 full-time referees, including six in family law, four in juvenile court, two in probate, one who handles mental commitments and another handling matters that are an offshoot of a domestic abuse statute. In Ramsey County, three referees handle family court work full-time, with others doing juvenile court as well; one probate referee also handles traffic, and a new housing referee has been added. The state court administrator's office currently calculates that full and part time judicial officers add the equivalent of 17 full time judicial positions in Hennepin County, and nine in Ramsey County. These represent an addition of over 30% in judicial personnel, suggesting how important parajudicial personnel continue to be in the state's two major urban districts, in spite of stated policy preferences against their use. Recall however that the study commission carefully recommended against "expanded use of referees and judicial officers," and did not comment on continued use. Thus unification did not compel abolishing or even phasing out these positions.

While the possibility always exists that these positions could grow in number and scope of responsibility, the main pressure today is in the opposite direction. This is very likely a result of the state court administrator's office treating the 17 Hennepin and nine Ramsey County full-time equivalents as judgeships for the purpose of calculating whether those two counties are entitled to additional judgeships. Thus Hennepin is assumed to have a complement of 71, and Ramsey of 33. As a result, Hennepin County's veteran court administrator indicated that he favours converting vacant referee and judicial officer positions into full district court judgeships, on the assumption that a regular judge will in practice be more productive. While some Hennepin County judges share this view, both Hennepin and Ramsey opposed conversion in 1991, preferring to continue the system by which referees are appointed by the district court judges.

The continued existence of judicial officers in the two largest counties in Minnesota suggests that even in the "purest" one-level trial court, judicial inequalities may persist. In a practical way, their existence is contrary to steps taken in Ontario during Phase One of its court reform plan to eliminate the masters who had sat in the High Court of Justice in Toronto. One of the Ontario Government's arguments was that it would be deemed unfair by judges outside Toronto for masters to do work in Toronto that superior court judges would be required to do in other centres. During my time in Minnesota, I heard no similar concern expressed by judges and judicial district administrators outside Hennepin and Ramsey, even though outstate judges have to handle all small claims and family matters.

At the same time, the exceptions noted in the three Minnesota counties should not deflect us from the recognition that a "pure" one-level trial court operates in 84 counties, and that even in Hennepin and Ramsey, no parajudicial officers handle any criminal or traffic court matters. The visible results are quite striking for a Canadian observer. In a crowded 11th floor courtroom in the modern Hennepin County Courthouse, I observed a district court judge with inherent and unlimited jurisdiction taking pleas and setting dates in traffic cases from 9 a.m. until noon. On another afternoon, I observed a district judge whose appointment predates unification handling preliminary criminal matters equivalent to bail reviews and first appearances in a Canadian Provincial Court.

Before considering whether daily events like these signal improvements in the quality, efficiency or accessibility of justice in Minnesota – or just the opposite – they should be put in context. The judge in traffic court was a new appointee. During her first year, she will sit in traffic court much more frequently than her more senior colleagues, as part of a conscious process of orientation and training that includes courses at the National Judicial College in Reno. Later in her career, she will continue to take courses, since Minnesota was one of the first states to require continuing education for judges as well as lawyers.

The judge handling preliminary matters in criminal cases left the bench at midday to return to her chambers to meet with counsel in a major civil case that has been assigned to her. Her work is typical of most of the Hennepin County district judges. The usual pattern is a roughly equal proportion of civil and criminal cases, along with six weeks of "mandatory" on the eleventh floor or in suburban courthouses. Criminal matters are scheduled on a master calendar basis, so the judge is assigned to a courtroom handing preliminary matters or trials. Civil matters are assigned on an individual calendar basis; each judge receives a "civil block" of approximately 230 cases per year. The cases are assigned to that judge at the time of filing, and he or she handles all pretrial motions and conferences, and presides at the trial itself (with exceptions noted below). The balance of civil and criminal work means that about 25% of a judge's time is spent on routine matters, a combination of the six weeks of mandatory time and the pretrial criminal work.

Ramsey County judges do not have as clearly defined a mix of civil and criminal cases. Judges there could not say how many weeks they sat on civil, criminal, family or traffic cases, partly because of the diversity of work and flexibility of assignments. There were some specialized assignments; for example, a judge with a special interest in juvenile matters was assigned to juvenile court for several months, partly because that court was outside the building in which the remaining courtrooms were located. Otherwise, judges were assigned to either civil or criminal cases or weeks, but if a trial collapsed following a last-minute settlement, another case could be brought in from either the civil or criminal side. One judge estimated that as much as 40 to 50 percent of his assigned time went to civil, criminal and other matters that would have fallen within the ambit of the previous limited jurisdiction court.

Judges in other districts not only maintained this variety of work, but added a geographical dimension as well. For example, the rural Fifth District was divided into three or four county minicircuits, so that judges would move within a relatively compact area, ensuring either that work was available when a trial collapsed, or judges were available when too many cases went forward at an overbooked court location. Family and juvenile matters were a regular part of the case mix.

The generalist nature of the Minnesota judges' work contrasts with the expectations of many opponents of unification who fear that a large one-level trial court will inevitably produce specialist judges handling civil, criminal or family matters. This has not been the case thusfar, and it appears that in the multi-county districts and in Ramsey County this pattern will be maintained. I am more hesitant to make a firm prediction about Hennepin County. The judges are committed to doing both civil and criminal work, but it does create more scheduling complexities in a large court, and it may also entail additional staff costs. Each district judge in Hennepin has two law clerks. One is usually a young law graduate whose work focuses on legal research, and judges in other districts also have these law clerks. The second is in effect an administrative or scheduling clerk whose main responsibility is to support the judge's management of his or her civil block. As these staff members shift from the payroll of a relatively prosperous county government to the state judicial payroll, new pressures may develop when the state court administrator's office is called up to allocate positions among the districts.

EVALUATING THE PROCESS

While Minnesota's one-level trial court is still new, and therefore a full evaluation is difficult, the newness itself makes it easier to assess how key actors feel about unification. An impressive range of support exists for the one-level court, but so do some important criticisms and reservations. It may be appropriate to divide these observations into an evaluation of the process, the results, and the meaning.

The unification process in Minnesota is unique in American state court reform. Most structural changes require constitutional amendment, but Minnesota experts concluded that legislative authority was sufficient. The use of legislation led to more extensive delegation of the process to the state court system and the local districts themselves. In a Canadian context, it would be as if each one of B.C., Ontario, or Quebec's judicial regions were told that they could combine their two trial courts as long as superior court and Provincial Court judges, voting separately, agreed to a plan for doing so.

The outcome of the process is not as neat on paper as a mandatory statute free from grandparent clauses applicable only in some counties and not others. But mandatory statutory provisions do not always – or even normally – translate into uniform practices, so the apparent neatness of the mandatory alternative may only paper over the maintenance of old patterns. Thus the kind of local give and take that occurred in Minnesota's ten districts may have produced a greater willingness to live with the result.

On the other hand, that give and take took its toll on the participants. While the judges I interviewed were more often on the winning side of the conflicts that set district judges against county and municipal judges, they conceded that the process was "really painful," citing the stress that went with counting votes before judges' meetings, and enduring the bitterness of colleagues who felt the reforms were unnecessary at best and detrimental at worst. In both Minneapolis and St. Paul, incumbent chief judges who sought new mandates from their colleagues were defeated recently by narrow margins, even as the old district-municipal split has given way to new issues dividing the bench.

It is important to note that neither the process nor the result drove any judges from the bench. I asked a number of respondents whether any judge had quit, or perhaps retired early, as a consequence of unification, and the answer was consistently negative. During the process, one Minneapolis district judge did resign, but for financial reasons; the salaries were too low. (Former state court judges in the United States do not face the restrictions common in Canadian provinces and other common law jurisdictions that prevent retired judges from appearing as counsel.) Since unification has been completed, that judge has returned to the bench, although the salary is still not an incentive. District judges earn U.S.$78,768. as of January 1, 1991, making Minnesota 25th ranked among the 50 states.

While Minnesota's voluntary unification process seems to contrast sharply with Canadian practice, it is not unprecedented. Canadian court reform has used pilot projects, notably the four unified family court pilots initiated in the 1970's. However, even though all four were evaluated positively and have since been made permanent, only one has been expanded to the rest of the province (Fredericton, New Brunswick), and that expansion decision was made as part of overall provincial policy at an early stage in the process. In contrast, Minnesota's process operated with a greater degree of local court initiative and maintained its momentum. Hints that the Ontario Attorney General may initiate a unified criminal court pilot project in his province therefore seem perplexing, since the contrasting precedents in Canada and Minnesota suggest that our pilot projects, even when successful, have not generated the momentum their sponsors anticipated.

EVALUATING THE RESULT

In evaluating the results of Minnesota's unification, interviews suggest an increase in accessibility, a reflection of the broader jurisdiction of rural judges on circuit. The South Dakota complaints about losing the local JP were not heard in Minnesota, due in part to the fact that Minnesota had already eliminated its local JPs over a decade earlier, in 1971, appointing county judges who were not required to reside in every county. In this context, unification became a benefit to small-county practitioners.

In terms of efficiency, opponents feared increased costs if former county and municipal judges added the law clerk and court reporter given to the district judge, and augmented their travel budget so that they could move around the district and be better prepared to campaign for reelection on a district wide basis. Early reports indicated no increase in travel expenditures. In 1984, the 131 county and municipal judges already had 85.2 court reporters and 36.5 law clerks, so any increase would build upon a large existing staff complement. Observed the study commission majority in 1984:

> *Testimony offered by proponents of consolidation and district administrators asserted that additional law clerks would not be necessary. Proponents testified that present workload does not justify the addition...*
>
> *Proponents [also] assert that additional court reporters will not be necessary. They acknowledge that some judges may hire court reporters, but the overall cost will not be as high as asserted by opponents.... [I]t was pointed out that many outstate county court judges utilize electronic recording equipment and do not anticipate hiring reporters.*

On the positive side, efficiencies appear to be emerging from the one-level trial court as well. The Tenth District claimed early to have reduced delay, and current state figures are strong though not exceptional. Important new initiatives in caseflow management are under way in Ramsey County that participants feel could provide a model for urban courts beyond state boundaries as well.

Finally, in terms of quality, continued disagreement is easiest to find here. When I asked to speak to critics of unification, interviews were set up with two Hennepin County judges and one Ramsey County judge, all of whom had been on the district court prior to unification. The judges' current views range from "cooperative skepticism" (court processes need "a lot of fine tuning," but unification was "not a mistake") to strong and continuing criticism (fears were "more than realized"; "my bench has suffered" and the civil bar has "extraordinary contempt" for our bench today). Both Hennepin County judges felt that the previous two-level court system functioned well in Minneapolis; efficiency gains that may have accrued to low-population areas outstate were irrelevant in Minneapolis, where the declining quality of the bench created inefficiencies as trials grew longer because less experienced judges were more hesitant to intervene, and counsel more reluctant to accept the wisdom of an intervention.

The critical views attributed to the civil bar by the veteran Hennepin County district judge quoted above were not shared, however, by the current president of the Minnesota State Bar Association, Thomas Tinkham, a senior civil litigator in the the state's largest and most prestigious law firm. The merger was "clearly beneficial," he said, adding that his view is shared by most lawyers. "It doesn't make sense to have one court and one half-court." The quality of complex civil trials is "a real issue," Tinkham conceded. "I share the concern, but it doesn't bear on" unification. While it makes sense to have some specialization for complex civil and criminal cases, separate "big and little courts" don't address the issue at all.

Critics of the one-level court indicated that a major reason for the quality of district court judges in the past was the practice of appointing new judges first to the municipal court, and elevating them to the district court only after they had gained experience and shown the capability to handle district court work. When Chief Justice Douglas Amdahl sat as Chief Judge in the Hennepin County district court prior to his elevation in 1980, he opposed unification on the ground that this pattern would be destroyed. And the study commission also cited the argument that "municipal courts should be maintained as a training ground for future appointments to the district court bench" and noted the "long history of this practice" in Hennepin County. At the same time, the commission's conclusion was unequivocal:

> *The majority of the Commission strongly believes that the present system in Hennepin County [before unification] quickly burns out municipal judges and results in these municipal judges focusing all their effort on moving to the district bench.*

Whatever the validity of these contending arguments, the tradition in Hennepin County lives on in practice, as new appointees begin with a heavier dose of former municipal court work.

Some of the concerns about the quality of adjudication parallel those reported in South Dakota, and may also be related more to scheduling practices than to the characteristics of current or previous occupants of the bench. Clearly the maintenance of a generalist bench and the use of individual calendars in civil matters will mean that a complex civil case might be assigned to a judge without previous experience in the area of law at issue. This is one of the reasons why major American courts still maintain master calendar systems for civil cases, including the country's two largest: the Los Angeles County Superior Court and the Cook County Circuit Court. It is presumably also one of the reasons why master calendar systems predominate in Canadian trial courts.

The trial courts in all three states examined in this study have a common technique for mitigating the impact of these assignment systems. A party is entitled in a civil or criminal case to one automatic adjournment or recusal – but only one. This practice does not ensure that litigants will be assigned to a judge with expertise in a certain area of law, but increases the likelihood that the parties are not left with a particularly weak or unpleasant judge. On the other hand, problems arise when this practice is abused, especially in criminal cases. An assistant district attorney may be unhappy with how a new judge handled a criminal trial, and then recuse that judge from a number of upcoming trials. "We used to call that breaking them in," said one judge who had practiced criminal law before going on the bench.

In short, valid complaints from the bar about the quality of adjudication in particular cases may reflect the reduced ability of counsel to bring a case before a judge with specialized expertise. While the larger courts that spring from unification reforms may be less likely to customize case assignments than their smaller predecessors, this change also reflects contemporary views about judge shopping that have affected the assignment procedures in smaller courts as well.

Another basis for a concern that the quality of justice has decreased in Minnesota is not a function of unification, but a function of the appointment process in recent years. No respondents indicated that lawyers are refusing to accept judgeships because of the increased proportion of former municipal court cases assigned to district court judges. State Bar President Tinkham, currently a member of the governor's judicial selection commission, noted that "eight or ten just excellent lawyers" applied for a recent Hennepin County vacancy. However, other observers did report criticism directed at the governor for making appointments that emphasized partisan loyalties more than merit. (The two-term incumbent was narrowly defeated for reelection in November 1990.) On the other hand, the governor received credit for appointments that increased the representation of women and visible minorities on the bench, although not without some concern that some able appointees lacked the years of law practice of past appointees.

In fact, increased representation of women in the Minnesota courts may be an important factor in improving the quality of justice in that state. At the end of 1990, Minnesota became the first state in the United States ever to have a majority of women on its highest court, when the outgoing governor named a fourth woman to the seven-judge bench. The state court administrator is a woman, as are large numbers of district judges. One of the critics of unification is a woman judge, as are a number of its strongest supporters. The contrast with South Dakota, which has one woman circuit judge and one woman law-trained magistrate, and with the male dominated Illinois court system, is striking. And the increased gender equity may be having a larger impact, as reflected in the wide ranging report of the Minnesota Supreme Court Task Force for Gender Fairness in the Courts. [II.D.]

Whatever benefits may accrue from this change obviously cannot be traced back to trial court unification. But the effective operation of the unified trial courts may benefit. By fall 1990, the Hennepin and Ramsey County district courts had each elected women chief judges, Roberta Levy in Minneapolis and Joanne Smith in St. Paul. Both chiefs were developing new initiatives at the time of my field visit. And perhaps Chief Judge Smith, as a native of Winnipeg, will bring yet another dimension to her job.

EVALUATING THE MEANING

One thoughtful critic of unification both articulated and embodied some of the more fundamental changes that have accompanied trial court unification in Minnesota. He distinguished between the unification of the court as an administrative organization and the unification of the judges as a professional group. Unifying the court created, he felt, "major major chaos," by expanding court calendars without sufficient recognition of the differences among them. "Yesterday," he said, "I had a list of 23 pages of out-of-custody misdemeanors." New efforts to improve caseflow management on the criminal side "work well on getting rid of cases," but become too much of a "processing experience" in which the idea of a deliberative enterprise is lost, making these steps inappropriate for most felony cases.

At the same time, the judge expressed real satisfaction with unification of the judiciary, even though as a district court judge he had opposed the levelling of the two classes of judge. "I wouldn't want to spend 70 to 80 percent of my time on municipal court work, but I don't mind" doing it 40 percent of the time. "You can do public relations for the court, and I enjoy dealing with younger newer lawyers." And "there's nothing to take home" at the end of the day.

These contrasting reactions are interesting because they suggest what social scientists call counterintuitive findings. Given the arguments over trial court unification, one would expect to find benefits from the unification of the court's administrative apparatus, and costs from the new requirement that former superior court judges take their full share of low-dollar low-penalty cases. In fact, the unified organization now faces additional administrative difficulties – particularly in larger courts – while the new classless judiciary may be functioning better than expected.

Two more fundamental developments may be under way, ones that transcend Minnesota and its sister jurisdictions south and north of the 49th parallel. On the organizational side, caseflow management, judicial branch planning and other accoutrements of modern court administration, so long awaited and so long heralded as answers to overcrowded, inefficient and underfunded courts, have gained a momentum of their own. But that momentum may not be subject to the kind of reflective and critical thought that keeps all worthwhile reform from overtaking its original objectives or hurtling off track. The purpose of court management reforms has always been to reinforce and make possible effective adjudication, not to replace "informed and explained judgment" with rapid fire decisions that an appellate court will try to repair later. For example, good case management differentiates expedited cases from those requiring full consideration and those requiring exceptional procedures to ensure that critical questions of fact and law can be addressed and decided. Judicial decision-makers need to understand these administrative changes so that reform can be effective, not so that judges and lawyers become more preoccupied with obtaining dispositions than achieving just results, or more preoccupied with settlement than the informed and willing acceptance of a freely made offer.

To the extent that trial court unification holds out promises of increased efficiency, of more case dispositions per dollar or per judge, it puts pressure on administrative judges and court service managers to produce measurable results, to emphasize production over deliberation. On the other hand, justice cannot emerge from a deliberative process that is so delayed and so costly that when legal norms are finally articulated, they leave a dry and brittle taste in the mouths of litigants. Thus administrative reforms that reduce costs and delays are essential, but only insofar as they provide a basis for a fair and reasoned process and a just result. Now that progressive court systems such as Minnesota's accept the validity of modern management, it needs thoughtful practitioners more than partisan defenders. Otherwise, the principal objectives of trial court unification could be undermined should short term reductions in elapsed time or gains in productivity change the nature of the deliberative process in the longer term.

Finally, on the judicial side the acceptance of the one-level court may lead trial judges to redefine their tasks. The change goes beyond the recognition that previously denigrated types of cases also provide an opportunity to do justice, that for example landlord and tenant can be interesting. It goes to the heart of how judges define their role and their tasks. Under a two-level model, and even more under the English superior court model, the generalist judge was praised, but his generalized skills were spread among a relatively narrow range of high-dollar high-penalty cases in which effective direction could be provided by experienced counsel. Opponents of a one-level court fear that it will lead to excessive specialization, yet in Minnesota the opposite has been required in order to attain an equitable spread of mandatory weeks of high-volume matters. In the process, judges have defined an even more generalized role that recognizes both the common attributes of adjudication and the distinctive attributes of matters ranging from complex cases to cases involving unrepresented litigants. A flexibility in style may be necessary to handle this diversity, along with core values anchored in the need to attain justice across an increasingly wider spectrum of cases.

Meanwhile, the gradual and incremental process by which Minnesota's courts have changed so much over the past 20 years still continues. The complete state funding of the trial courts is under way, as a number of positions and activities are shifted from county budgets to state budgets. Sandy Keith, the lawyer who chaired the Court Consolidation Study Commission in 1983-84, became the new Chief Justice of the Minnesota Supreme Court in the fall of 1990, equipped with wide familiarity with the statewide system for which he is now responsible. Minnesota will require once again its distinctive combination of state-level expertise and energetic leadership on one hand, and local initiative on the other. With state funding now combined with broad state judicial rule-making authority, the state supreme court and state court administrator's office will need even more sensitivity and responsiveness, both to the internal dynamics of the trial courts and to the needs of litigants and the public who depend on the courts.

Chapter Five

Patterns of Trial Court Unification in the United States

The purpose of conducting field research in Illinois, South Dakota and Minnesota was to understand more fully how their unified trial courts have developed and how they operate in practice. The purpose of this chapter is to see what lessons can be drawn from American experience. What common and divergent patterns have characterized trial court unification in the United States? How are these findings relevant to reform of Canadian trial court structure? What practices are transferable? Will the results be similar or different?

The most obvious pattern that emerges is that unified trial courts tend not to follow the American Bar Association model of a one-level court with one class of judge—the model supported in principle by Canadian provincial attorneys general. Two competing explanations for this finding will be considered, along with the implications of these explanations for Canadian court reform.

A more fundamental finding is that the nature of the unified court that emerges from structural reform, and the benefits that are realized, depend upon the structure that was in place prior to court reform. Once stated, this proposition seems obvious. Yet it is too often ignored when reforms are supported as if their benefits in one court system will be the same as in others.

Three characteristics of American court organization that differentiate it from Canadian will be highlighted: the absence of statewide trial court chief justices, the existence of a dual system of state and federal trial courts, and the prevalence of intermediate courts of appeal even in relatively small states. These three distinctive aspects of American courts mean that trial court unification will have different effects in that country than in other common law jurisdictions.

ONE-LEVEL VERSUS TWO-LEVEL TRIAL COURT UNIFICATION: THE PERSISTENCE OF SUBORDINATE JUDICIAL OFFICERS

Canadian proposals to unify the two existing provincial trial courts assume that the new single court will also have a single class of judge. It is this outcome that is desired by the proposal's supporters, who believe that the administration of justice will benefit by elimination of hierarchical divisions among trial judges and between classes of judicial business. It is also this outcome that most alarms the proposal's opponents, who believe that a one-level trial court is an ill-conceived and unrealistic idea.

The one-level trial court, as Chapter Two showed, derives from the court organization standards of the American Bar Association, most recently reiterated by a committee headed by former Minnesota Chief Justice Douglas Amdahl. Yet American practice shows quite clearly that even the small minority of U.S. jurisdictions that have one rather than two or more trial courts do not yet have a one-level trial court. The Illinois and South Dakota courts were both designed with two classes of judges. Illinois' second-level judges have much broader jurisdiction than their South Dakota counterparts, but both groups are fully qualified members of the state bar who are addressed as "judge" in spite of their "associate" and "magistrate" qualifiers.

Unlike Illinois and South Dakota, Minnesota's trial courts were unified with the goal of having only one class of trial judge. All judges are paid the same salary and rotate through a full range of cases. But even there, unification of the bench is incomplete. The two most populous counties, containing Minneapolis and St. Paul, have maintained referees and other judicial officers who add over 30% to the counties' judicial complement, and handle the bulk of the family law and small claims work. Minnesota continues to strive for a one-level system, and has gone further than any other state, but has still not reached the stage that Canadian attorneys general support in principle for their provincial trial courts.

Review of other American jurisdictions suggests a pattern similar to that of the three field work sites. Idaho and Iowa maintain subordinate judicial officers throughout the state, as in Illinois and South Dakota. Wisconsin's one-level trial court is supplemented by

194 Municipal Courts with 190 part-time and three full-time judges who handle traffic and by-law violations. Included among these traffic matters, however, are first offence drunk driving cases – usually the largest single category of Criminal Code offences in our Provincial Courts. Massachusetts claims a unified trial court, the Trial Court of the Commonwealth, with 320 justices all paid the same salary. But the court retains seven separate departments corresponding to the separate courts that existed before reorganization (still called the Superior Court, District Court, Probate and Family Court, Juvenile Court, Housing Court, Land Court and Boston Municipal Court), and judges have remained full-time within their separate "departments". It is as if Ontario, having renamed its trial court the Ontario Court of Justice, was declared to be unified simply by making the salaries of its Provincial Division judges equal to those in the General Division. [State Court Caseload Statistics Annual Report 1989, II.A., pp. 193, 222]

Connecticut's Superior Court provides one of the most interesting examples of the limits of unification. During the 1970's, Connecticut went from a three-level trial court system to two levels (merging its Court of Common Pleas into its Superior Court), and finally abolished its limited jurisdiction Circuit Courts. Connecticut is a geographically compact state, with 3,239,000 people living in 12,997 square kilometres, less than one-quarter the area of Nova Scotia and little more than double Prince Edward Island's 5,657 square kilometres. Its county governments have been abolished, so its trial courts are fully state-funded, and even court scheduling functions are centralized at the state level.

Extensive field work was done in Connecticut in the early 1980's by a team of American researchers headed by Thomas A. Henderson, as part of the most important comparative evaluation of the effects of court reorganization ever done in the United States. Henderson and his associates found that the Superior Court was in practice divided into 12 "judicial district courts" and 21 "geographic area courts" with responsibilities that corresponded to the general and limited jurisdiction courts prior to unification. (There were also 14 juvenile court districts.) More troubling was the finding that former Superior Court judges continued to sit in the judicial district courts, and Circuit Court judges in the geographic area courts. One researcher found a small-town geographic area court that met in an unheated town hall while a nearby judicial district courthouse contained two courtrooms and one judge, who refused to allow the geographic area court to meet there.

At the time, Connecticut court officials expected these early frictions to be overcome as new judges were appointed. More recently, however, the state has realized that it has allowed two trial courts to continue on a *de facto* basis in spite of the commitment to a one-level system.

Interestingly, none of the structural changes in Connecticut ever touched its 132 Probate Courts or 132 Probate Court judges, who continue to have exclusive estate and adoption jurisdiction, along with "miscellaneous domestic relations, mental health [and] miscellaneous civil" jurisdiction. [State Court Caseload Statistics Annual Report 1989, II.A., p. 178] The Probate Courts also remain outside the unified state administrative apparatus. Each court is financed out of its own fees, and hires and pays its own staff. The central control comes through a uniform set of court rules and procedures. At the time of the Henderson study, the Probate Court most closely resembled a hypothetical "franchise model" that was labelled the "Kentucky Fried Courts" approach to court organization. [See Baar and Henderson, II.A.]

The one American jurisdiction that has had the longest experience with a model one-level trial court is the District of Columbia. Its Superior Court was created in 1969 with 44 judges, as part of the Nixon Administration's crime control legislation for the nation's capital. The new court replaced the limited jurisdiction Court of General Sessions, adding some matters previously within the jurisdiction of the federal district court for the District of Columbia. The number of trial judges remained relatively stable, as increases in major crime were balanced by a decline in population (to 604,000 by 1989). By 1987 the court had 51 judges, but the number jumped to 59 by the end of 1990.

Throughout the first decade of its operation, Superior Court adjudication was handled solely by the Superior Court judges. Rotation was the operating principle, although some assignments could involve terms of close to two years. (Current civil, family, misdemeanor and felony terms run 9-12 months.) As routine work increased, the court received statutory authority from the U.S. Congress in the early 1980's for three positions as "special referees," primarily for family matters. These supplemented existing "special hearing officers," lawyers who worked part-time handling noncriminal violations. As criminal caseload pressures mounted in the mid-1980's, these officials were assigned to criminal matters, until the family referees and three hearing officers were transformed into full-time "hearing commissioners". The positions have continued to grow in number; the court's *1990 Annual Report* displays the photographs of 15 hearing commissioners.

The hearing commissioners' caseload emphasizes the District's small claims cases (over 40,000 dispositions in fiscal year 1990) and misdemeanors (24,000), and also extends to some landlord and tenant (over 69,000 dispositions) and domestic relations, paternity and child support cases (over 20,000). The subordinate status of the hearing commissioners is reinforced by the requirement that their decisions be vetted by a Superior Court judge before a litigant can go to the D.C. Court of Appeal.

Thus there does not appear to be a single jurisdiction in the United States that has a unified trial court with only one level or class of judges. This outcome was to some extent anticipated in the American Bar Association standards themselves. Immediately after enunciating the principle that the trial court "should have a single class of judges," the next sentence states:

> *To assist the judges, the court should have a convenient number of judicial officers performing such functions as conducting preliminary and interlocutory hearings in criminal and civil cases, presiding over disputed discovery proceedings, receiving testimony as referee or master, and hearing short causes and motions, all of which are subject to judicial review.*

The subsequent commentary reiterates the importance of a single class of judge, and considers "the expedient of having an additional class" – while possibly "useful" as a transitional measure – "unwise as a long-term arrangement." Having stated that broad principle, the commentary returns to its earlier important qualification:

> *At the same time, it is clear that many judicial functions of a trial court can be performed ably by officials who are not full-fledged judges where appropriate procedures assure they are accountable for their decisions and actions. Such officials are referred to here as judicial officers ..., a term that includes court personnel known variously as magistrates, court commissioners, referees, and masters.*

The functions of these judicial officers were "classified into two general types": "the hearing of parts or stages of larger proceedings" and "presiding over the trial of smaller civil and criminal matters under the general authority and supervision of judges. In the latter capacity," recognizes the commentary, "the judicial officer would perform the functions now performed in many instances by judges of courts of limited jurisdiction."

Within this definition, Minnesota and the District of Columbia still fit the standards, since neither the Twin Cities' referees nor the District's hearing commissioners are called "judges." At the same time, however, this approach perpetuates distinctions between types of adjudication even when these distinctions were supposed to be abolished as detrimental both to justice and to the public's perception of justice.

The major distinction between having a set of subordinate judicial officers within a single trial court and having a separate limited jurisdiction court is the process by which these judges/judicial officers are controlled. The work of limited jurisdiction trial courts is reviewed through the appellate process; the work of judicial officers is reviewed administratively through processes established within the trial court. The latter approach can be continuous and proactive rather than intermittent and reactive; it is bureaucratic rather than judicial in form. Whether it is more effective and increases the quality of adjudication should be the subject of further empirical study.

EXPLAINING THE PERSISTENCE OF SUBORDINATE JUDICIAL OFFICERS

There are currently two competing theories advanced to explain why two levels of adjudicators (whatever their titles) seem to persist even in unified trial courts. The first explanation is historical and political. The second explanation is organizational and technological. The historical explanation sees subordinate judicial officers as a continuation of earlier patterns, as a method of organization that has not fully evolved. Illinois' and South Dakota's associate judges and magistrate judges fit this theory, since each system had a number of different limited jurisdiction judges prior to unification, and reduced that number to a single class of limited jurisdiction judge which was then placed within the single trial court.

Minnnesota's experience supports this theory as well. The grandparenting of incumbent judges in some districts reflects the local-option approach to court unification and is rapidly losing its impact. The Twin Cities' referees are a hangover from earlier reforms, primarily in family law. They have not grown under unification, and if anything there may be pressure to convert future vacant referee positions to judgeships. The historical explanation is preferred by advo- cates of trial court unification, such as the Minnesota county court judge on the state's Court Consolidation Study Commission, who responded to

> *... fears that unification will give rise to a host of lesser tribunals as in other states. There are no statistics to establish that this must happen. Most writings attribute this development of classes of judges as being the result of political compromise in which an elite top-level court is preserved.*

The organizational explanation sees the existence of two classes of judges as an inevitable byproduct of the nature of the adjudicatory process. What the ABA terms "short causes" require a different type of adjudication than the adversary hearings that typify superior court proceedings. In certain respects, short causes are more difficult. Parties often appear without legal representation. Factual and legal issues must be assessed quickly, with less time to reflect on the appropriate rule to apply. Interaction with litigants is direct and not mediated by counsel, drawing the judge into the arena in a more personal way. Henderson and his associates labelled this process "decisional adjudication" and contrasted it with the "procedural adjudication" that dominates superior courts – where the judge is more passive, responding to matters put forth by counsel. [See Henderson et al., 1984, II.A., ch. 4, and Kerwin, Henderson and Baar, II.A.] Professor Thomas Cromwell, in a background paper for the Canadian Bar Association's Court Reform Task Force, builds on this analysis to conclude that even a one-level trial court will inevitably develop two classes of judges. [I.A.]

American experience lends some but only limited support to this theory. Connecticut's division of its one-level court into judicial district courts and geographic area courts seems to support the historical rather than the organizational explanation. Minnesota's one-level court is so new that organizational pressures to expand the role of referees have not yet developed. It may be that trial court structure in the United States is currently at a point in its evolution where the impact of past historical forces is more visible than the impact of current pressures on the organization.

This evolutionary view may account for the emergence of hearing commissioners in the District of Columbia Superior Court. The D.C. court is the oldest one-level trial court in the United States, and a full-fledged corps of subordinate judicial officers did not emerge until well into the court's second decade.

One factor that generates pressure for change in organizations is financial, and courts are also subject to the pressures of funding authorities to hold down expenditures. To the extent that cost savings could result by shifting adjudicative tasks from higher-salaried judges to lower-salaried judicial officers, legislative pressure may build to make these changes. The salaries of state court judges in the United States may not be high enough to see this effect. The highest salary for judges in a unified state trial court as of July 1991 is in Connecticut, where a judge's base salary is U.S.$85,848., with supplementary increments based on length of service. Given that the salaries of superior court judges are substantially higher in Canada, financial pressure could be greater to expand subordinate judicial officers in a one-level provincial trial court.

Evidence for the impact of financial pressure comes again from the District of Columbia Superior Court. Because the salaries of its judges are linked to the salaries of federal district court judges, they are easily the highest in the nation – U.S.$125,100. per year – compared with a salary of U.S.$100,000. for the highest state trial judge.

Thus the growth of hearing commissioners in the District of Columbia could be linked both to the age of its unified trial court and the high salaries of its judges. One might also observe the growth of subordinate judicial officers in the U.S. federal district courts. The old system of U.S. commissioners was expanded in the late 1960's into a new system of U.S. magistrates, and the magistrates recently attained the title of Magistrate Judges.

Policy innovations may be another factor that leads to the expansion of subordinate judicial officers. Thus in 1989, the Minnesota legislature funded a housing court in Hennepin and Ramsey Counties as a three-year pilot project. A key element of the project is the appointment of a specialized housing referee in each county.

In summary, there is support for both the historical and organization explanations for the persistence of subordinate judicial officers in unified trial courts. Transferring these findings to Canada, it is not surprising to find that when the Ontario Government presented its plan for a one-level trial court, both justices of the peace, who have handled provincial offences for many years, and part-time deputy judges, who handle small claims, were retained. On the other hand, New Brunswick has neither JPs nor deputy judges. If it were to unify its two current trial courts, all adjudication would be done by section 96 judges. The cost associated with a superior court judge doing the parajudicial work performed by justices of the peace in other provinces could very likely lead to pressure to create a new class of subordinate judicial officers in New Brunswick, albeit in a much more unified court structure than exists today.

EVALUATING BENEFITS COMPARATIVELY

After the unified trial courts in Illinois, South Dakota and Minnesota were described in Chapters Three and Four, each system was evaluated in terms of whether and how accessibility, efficiency and quality had changed following unification. What overall patterns emerge when the three states are examined together?

The answer is straightforward but not uniform, because the benefits of the new system depend in part on the defects of the previous one. Thus accessibility was seen to decline in rural areas of South Dakota when part-time lay magistrates were abolished and replaced by travelling circuit judges and law-trained magistrates, while accessibility was seen to increase in rural areas of Minnesota, where two classes of travelling judges were replaced by one class with full judicial authority. In turn, fewer differences were observed in Illinois, which retained a relatively localized system before and after unification.

Efficiency gains were cited in all three states, reflecting the flexibility of judicial assignments and the development of an organizational framework for implementing programs to reduce delay and promote efficiency, both at the state and local levels. On the other hand, administrative complexities were evident in the two largest trial courts: Cook County, Illinois, and Hennepin County, Minnesota. The stresses associated with the operation of a large urban trial court may reflect the fact that court management theories and practices have focused on medium-sized courts; both Cook and Hennepin have able and experienced administrators, but the design options available to those officials appear to be more limited.

The effects of trial court unification on the quality of justice depend once more on state and local conditions, yet patterns again emerge. Illinois' system of associate judges has improved the quality of justice over the earlier system of part-time municipal judges, and the system of bar polls and selection by circuit judges has developed a cadre of associates who are often elevated to the circuit bench or assigned to traditional superior court work. South Dakota's law-trained magistrates in many cases replaced less-qualified lay magistrates. Minnesota's county and municipal judges were already full-time and law-trained, yet having these well-qualified individuals sitting for extended periods hearing only high-volume, low-dollar and low-penalty cases did not promote the quality of justice. Interview respondents suggested that varying the work of trial judges, by using a larger number of judges to do limited jurisdiction court work for shorter periods of time, has improved the quality of adjudication in those cases.

Mixed responses were obtained about the quality of adjudication in cases formerly within the exclusive jurisdiction of superior trial courts. While rotation was seen to improve quality in limited jurisdiction matters, specialized expertise was seen by some respondents as necessary to ensure quality in complex and unusual cases. Specialization was given more emphasis in Illinois, whose two largest counties used long-term assignments and a master calendar approach. In contrast, South Dakota and Minnesota's largest centres took an individual calendar approach that minimized the discretion of litigants to choose a judge with more expertise, and the discretion of presiding judges to assign one.

The high degree of specialization in Illinois' Cook County and DuPage County Circuit Courts reflects not only their size but also the historical antecedents of current court practice. Both courts separate their civil matters into a Law Division and an Equity Division, mirroring the English procedural distinction of previous centuries that has long since disappeared as a factor in how Canadian – and almost all American – trial courts are organized. The Illinois distinction mirrors that state's separation of jury and non-jury civil matters, and therefore makes sense to those courts as a way of classifying cases. It remains ironic, however, that America's pioneer unified trial courts retain a distinction between law and equity no longer reflected in the organization of two-level trial courts.

The mix of possible benefits that unified trial courts could bring to Canadian provinces depends therefore upon two conditions: (1) how existing provincial court systems are organized, and (2) what type of unified court is selected. Beginning with the second condition, would a unified provincial trial court be designed as in Minnesota, so that existing Provincial Court judges would all be elevated to Queen's Bench, Supreme Court, Superior Court, or General Division judges? Or would a unified court be designed as in Illinois or South Dakota, so that Provincial Courts would cease to exist, and Provincial Court judges would become associate judges within a single superior trial court?

Minnesota more closely approximates the model of trial court organization endorsed by the provincial attorneys-general, and advocates of unification would be unlikely to choose Illinois or South Dakota as models. Yet Minnesota built on an existing court system that differs from Canadian provincial court systems in important ways. Minnesota created an intermediate court of appeal prior to unification, ensuring that appeals that went from the old Municipal and County Courts to the District Court would not add to the workload of the state's final court of appeal. Minnesota had previously abolished its lay justices of the peace, so that low-penalty low-dollar litigation was less likely to be shifted to another class of subordinate judicial officers. And Minnesota's trial courts were not separated by subject matter (e.g. into civil, criminal and family divisions or courts), so that the judges in its new one-level court are generalists rather than specialists, maintaining a mix of civil, criminal and (with important exceptions) family cases.

The benefits that followed unification in Minnesota may follow a similar reorganization in Canada, but will depend again upon the pre-existing provincial court structure. For example, accessibility could increase in a province where small Provincial Court centres have already been consolidated, as they had been in Minnesota, because existing centres would be served more frequently by judges with wider jurisdiction. On the other hand, in a province that has retained more numerous and smaller Provincial Court centres, geographic accessibility may be reduced if court locations are consolidated. Similarly, efficiency would increase if judges from two different courts currently travel to the same sitting point for a small number of cases, since a single judge would have sufficient jurisdiction to do all pending work in a one-level court. If existing courts are sufficiently large, and assignments sufficiently flexible, efficiency gains would not be as great, and very large courts might create more difficult management problems. Finally, the quality of justice in low-penalty low-dollar cases would benefit if the variety of matters handled by former Provincial Court judges increased, while the effort to maintain generalist judges in superior courts might reduce existing discretion to assign a more experienced or expert judge to particularly complex cases or cases in special areas of law.

Any effort to use the three American case studies to analyze the consequences of court reorganization in Canada must be done with caution. If any point is stressed in this section, it is the need to understand the current organization of a court system in order to predict the shape and effects of its future organization. Therefore, it is all the more important to examine our own provinces, particularly those that have already reorganized their trial courts. That task will begin in Chapter Six, and will precede any further analysis of proposals for a unified trial court. Before reaching that point, however, it is also essential to spell out three characteristics of American court systems that differentiate it from Canadian courts, and may therefore alter the effects of court reform.

THE DEMISE OF STATEWIDE TRIAL CHIEFS

In all but a handful of American jurisdictions, there are no statewide trial court chief judges. Chief judges – or presiding judges or assignment judges – administer a trial court within the limited geographical boundaries of a county, district, circuit or vicinage. No chief judge of the trial court as a whole acts as an administrative superior; the office does not exist. Rather, a county, district or circuit chief judge would look to the chief justice of the state's highest court of appeal (usually the state supreme court). Many states designate the chief justice as administrative head of the judicial branch.

While we often view Canadian courts as hierarchical because of the sharp differentiation between superior courts and Provincial Courts, this is a hierarchy of status and of legal authority, not a managerial hierarchy. In practice, the management of local Provincial Courts is overseen by a Chief Judge of the Provincial Court, just as the management of the superior court is overseen by a Chief Justice of the superior court for the province. The Chief Justice of the province rarely has the direct involvement in trial court issues that an American state chief justice has, but focuses on the operation of the appellate court and representation of the judiciary beyond the courts. Thus the management structure of American trial courts is more hierarchical than the management structure of Canadian trial courts, even where creation of one-level trial courts has abolished the formal status hierarchy of general and limited jurisdiction judges.

The traditional exception to the general American pattern was in the New England states. A number of those states had a chief judge of the superior court (Massachusetts, Connecticut and New Hampshire) and a separate chief judge for its limited jurisdiction trial courts. A study in the early 1970's dubbed that approach "the New England model." [State Court Administrative Systems, II.A.] It is, of course, also the old English model, as well as the Australian, New Zealand and Canadian model. However, as the largest New England states have unified their trial courts, their statewide trial chief judges have disappeared.

Following this pattern of change in Canada, one of the first casualties of a unified criminal court would be the office of chief judge of the former Provincial Court. Then, if a province chose to divide its courts into separate judicial districts, following the American pattern would lead to abolition of the office of chief justice of the superior court as well. These two offices would then be replaced by trial court chief judges within each region, reporting to the chief justice of the province.

It is unlikely that the office of chief justice of the provincial superior trial court would be eliminated in any Canadian province. At the same time, however, maintaining the chief justice of the superior court and eliminating the chief judge of the Provincial Court could reduce the priority given to high-volume criminal and family matters that previously dominated Provincial Court lists. One way to avoid this would be to designate associate chief judges with special responsibilities for those areas, but this could in turn reinforce subject matter specialization within the court as a whole, and lose the benefits observed in Minnesota's system of generalist judges.

These speculations are intended not as criticism of trial court unification proposals but as another reminder that the consequences of those proposals may be different in Canada than in the United States, in this case because the roles played by the chief justices of the provincial superior courts are without precedent in the management of one-level trial courts.

THE DUAL COURT SYSTEM

Readers of American court reform literature, with its emphasis on unification, simplification of procedures, clear jurisdictional lines, and the elimination of overlapping jurisdictions, would be surprised to find that forum-shopping remains for a wide variety of important and complex litigation in every state in the United States. This is because the United States, uniquely among common law federations, has a separate set of federal trial courts with broad jurisdiction extending even to controversies under state law.

Canadians are well aware of the American federal court system. Many of the American judiciary's most innovative and controversial decisions have come from the federal courts, and particularly from federal district court judges who have presided over institutional reform litigation or class action suits. Alabama federal judge Frank Johnson made the cover of Time Magazine for his courageous enforcement of civil rights laws in the 1950's and 1960's, and his subsequent enunciation of a "right to treatment" for patients held involuntarily in state hospitals. Minneapolis federal judge Miles Lord energetically oversaw litigation over the Dalkon Shield through pretrial and trial before stepping down to return to the private practice of law. While the Federal Courts of Canada or Australia handle interesting and important cases, they both operate within a more narrowly defined jurisdiction.

Federal jurisdiction in the United States is anchored by two main categories: diversity of citizenship and federal question. Diversity jurisdiction allows one party to sue in federal court as long as the other party is a citizen (meaning resident) of another state. In practice, corporate litigants consistently qualify for access under diversity, so a wide variety of commercial litigation can proceed in federal court, as well as any tort action where the parties qualify. The overlap with state courts is obvious, and efforts to limit or abolish diversity jurisdiction have been a staple of federal legislation over the past 30 years. Flango and Boersma [II.B.. pp. 405-06] cite opponents of diversity jurisdiction throughout the twentieth century, and state that "[p]roposals to curtail or abolish" diversity "have been made ever since [it] was conferred upon federal courts by the Judiciary Act of 1789." Opposition of trial lawyers has limited statutory change to increases in the dollar limit, which stands at U.S.$50,000. following 1988 amendments. Prior to this change, federal diversity jurisdiction was available in any matter over U.S.$10,000.

In past decades, diversity jurisdiction often gave plaintiff's lawyers access to federal juries whose awards in civil suits were considered more lucrative. Then more activist and liberal judges provided opportunities for innovative class actions and products liability litigation. For the past decade, conservative appointees of the Reagan and Bush Administrations have made corporations more comfortable in the federal courts, since state judges may owe their office to election by local people sympathetic to a suit against an out-of-state corporation. One South Dakota federal judge reminded his Canadian interviewer that if a South Dakota resident went to the county courthouse and sued a national corporation, that corporation could file in federal court (perhaps 100 miles away) for removal of that case from the state to the federal court. In answer to a question on whether the availability of federal court affects litigation strategy, the President of the Minnesota State Bar Association indicated that he considers the effects of proceeding in state or federal court in every major case he handles.

The important Report of the Federal Courts Study Committee in April 1990 recommended limiting diversity jurisdiction to complex multistate litigation, interpleader and suits involving aliens. As a fallback, the committee, recommended raising the limit to $75,000. and limiting access of large corporations and some citizen plaintiffs to diversity. In the upper midwest, according to a South Dakota federal judge:

> *...I think the overwhelming majority of district judges favor retaining diversity jurisdiction. The principal reason is that diversity cases are the most interesting cases we try.... [We] try to juries a higher proportion of diversity cases than any other category. [Unpublished speech by Judge John B. Jones, Sioux Falls]*

Federal question jurisdiction means that federal trial courts can hear any matter arising under federal law, which includes any case in which the plaintiff alleges the violation of federal law or federal constitutional rights. Twenty years ago, federal question jurisdiction frequently meant that state prisoners, in custody following conviction for violating state criminal law, could go to a federal district court on a writ of habeas corpus alleging violation of their constitutional rights by admission of evidence obtained through an illegal search or police interrogation, even after those issues were considered by a state appellate court.

Given their wide jurisdiction, U.S. federal district judges are more numerous than Federal Court of Canada judges, although their numbers remain small compared with state trial judges. Consider the three states studied in Chapters Three and Four. South Dakota has five federal judges, three active and two seniors (similar to Canadian supernumerary judges), a much higher proportion than in Minnesota, with seven active and two seniors. Illinois is divided into three federal district courts with 27 active and seven senior district judges. The federal courts also house a number of specialized bankruptcy judges (termed bankruptcy referees until the 1970's) and magistrate judges. Illinois for example has 15 bankruptcy judges, ten full-time magistrate judges and two part-time magistrate judges, giving the state a total of 61 federally-appointed judges.

In practice, federal courts are visible in major cities but are not a factor in small county or suburban county litigation. Even in Lake County, Illinois, immediately north of Chicago's Cook County, the local bar rarely uses the federal court, in contrast to Chicago lawyers. Just as major commercial litigation tends to be concentrated in key Canadian cities, American commercial litigation is found most frequently in precisely those centres where federal courts are most visible and accessible. Thus while the abolition of federal diversity jurisdiction would not boost the caseload numbers in most state trial courts, it is likely to add cases with longer trial times.

Because the federal courts are entirely outside state legislative and constitutional jurisdiction, advocates of unified trial courts at the state level simply ignore them. Research on unification has also ignored them; for example, they were never considered in the Henderson study. Thus, while Canadian court reformers wrestle with the difficulty of coordinating provincial and federal legislation, American court reformers simply define trial court unification as an issue from which federal trial courts are excluded.

From a comparative perspective, the results are ironic. Canadian civil litigants with a dispute over $50,000. already operate in a more unified court system than their American counterparts, who retain an opportunity for forum-shopping in a wide range of cases. Once the County Courts have been merged with the Supreme Court in Nova Scotia, no province will have more than one court for large civil claims. In contrast, most serious criminal cases can be tried in either of two different courts at the option of the accused or the crown; family law disputes may in many provinces require litigants to seek remedies in more than one court; and civil claims involving smaller sums of money may be tried by a variety of different judicial officers in different settings. It is almost as if the most fully unified court systems in the United States have court unification for the poor and forum shopping for the rich, while Canadian provinces have evolved a combination of court unification for litigants with high-dollar civil claims, and fragmented jurisdictions for all the rest.

To Canadians, it seems surprising that the framers of the American Constitution felt that a separate system of federal courts might be necessary to overcome the biases that laws and citizens of one state might hold against those of another. In a country where one province, Quebec, has a different legal system and has courts that operate in a language not shared by a majority of the citizens of the other provinces, one might expect to hear similar concerns, but none has been raised. The fact that the judges of provincial superior courts are appointed by the federal government may be one reason; that constitutional provision reflects a very different accommodation of the federal principle. The appointment power has magnified the complexities of reforming trial court structure in the Canadian federal system, but if a one-level trial court was created in any Canadian province, it would immediately be part of a more unified system than any one-level trial court in the United States, which continues to coexist at all times with a separate system of federal district courts.

The relations between state and federal courts in the United States raise issues that parallel those raised by unification advocates. For example, by hearing some of the country's most challenging civil cases, federal district courts remove from state trial courts an important source of variety and intellectual growth. And on a number of dimensions, the status of federal judges is higher than that of state judges. The pay differential is substantial, especially because federal judges are paid the same salary whether they sit in states with high-paid or low-paid state judges; South Dakota's state trial judges earn less than 50 percent of what a federal trial judge earns. The independence of federal judges is rooted in constitutional guarantees of life tenure restricted only by impeachment; retirement benefits are substantial because compulsory retirement would require a constitutional amendment. In contrast, most state judges serve limited terms and must run for reelection. Justices have resigned from the highest appeal court in a state to accept appointment to the federal trial bench.

Thus, to the extent that judicial business is divided between state and federal trial courts, and the higher status of federal judges is clearly established, the issues that led court reformers to press for unified one-level trial courts have been reproduced in the relations between state and federal courts. This result does not mean that to be consistent, the American Bar Association should advocate the merger and state and federal trial courts. But it does suggest that Americans find the value of retaining separate trial courts for certain kinds of cases great enough to override demands for consolidation and simplification.

In summary, the existence of a dual court system in the United States should remind Canadians of another way in which trial court unification remains incomplete.

INTERMEDIATE APPELLATE COURTS AND THE SEPARATION OF TRIALS AND APPEALS

A third characteristic of American state court systems that differentiates them from Canadian provincial court systems – and the court systems of other common law federations such as Australia and India – is the presence of two levels of appellate courts. The first appeal from a trial court in the U.S. is to what is termed an intermediate court of appeal, with the second appeal (this time discretionary rather than a matter of right) to the court of last resort. In the federal court system, these two levels are represented by the twelve circuit courts of appeals at the intermediate stage and the U.S. Supreme Court as the court of last resort.

At this writing, 38 out of 50 states in the United States have intermediate courts of appeal. (Texas and Oklahoma also have two separate courts of last resort.) [State Court Caseload Statistics Annual Report 1989, II.A., p. 25.] One would expect the presence or absence of an intermediate court of appeal to be related to the population of the state, and this is generally the case. Mississippi, with 2.6 million people, is the only state over two million population without an intermediate court of appeal, and Nebraska and West Virginia the only ones over 1.2 million. Note however that there are a number of relatively small jurisdictions that have intermediate courts of appeal, including Alaska (527,000), North Dakota (661,000), Idaho (1,014,000) and Hawaii (1,112,000). North Dakota's intermediate appellate court was set up in 1987 as a temporary court, while intermediate courts in the other three states are well established but small: their courts of last resort have five judges and the intermediate appellate courts have but three.

Following an American population standard alone, four Canadian provinces would be expected to have intermediate courts of appeal, as would three of the six Australian states. Yet Canadian provinces have only a final court of appeal. Judges in the three largest provinces (Ontario, Quebec, and British Columbia) have expressed interest in an intermediate appellate court, but no government has ever supported the idea. In Australia, only New South Wales even has a separate court of appeal. Victoria, with close to four million people; Queensland with over two million; and South Australia and West Australia, with over 1.2 million each, handle all appeals in their state superior courts. Similarly, in India, each state has a High Court and a District Court; the former is the superior court and the latter a statutory court of limited jurisdiction. In practice, Indian state High Courts handle both trial and appellate work.

Whatever the benefits or costs of creating intermediate appellate courts, it is clear that their prevalence in the United States contrasts sharply with their absence in other common law federations. In turn, no American state has a final court of appeal with more than nine members, while the largest Canadian provinces have long exceeded that notional ceiling, and Australian and Indian states have much larger superior courts from which appeal panels are drawn. What accounts for these differences between American courts at one end of the organizational spectrum, and Australian and Indian courts at the other?

American state courts have taken three judicial functions and parcelled them out to three distinct courts. The law development function of appellate adjudication has been placed primarily in the care of state courts of last resort, which meet *en banc*. The error correction function of appellate adjudication then becomes the specialty of intermediate courts of appeal, although that function is more restricted than in Canada, since American appellate courts do not entertain sentence appeals. Finally, the fact finding function is placed in the trial courts.

In Canada, the two appellate functions are combined in a single court of last resort in each province. Furthermore, superior courts combine the fact-finding function of trial courts with a supervisory appellate function that includes hearing interlocutory appeals and appeals from summary conviction. In Australia and India, all three functions are combined in the state superior courts, and the fact-finding function is divided among two or three levels of trial courts.

Thus the structural separation of the two appellate functions, law development and error correction, is found throughout in the United States, but not in the other three countries. Perhaps this reflects the fact that American courts have had an acknowledged role in "making law" for much longer than in other common law countries. It may also reflect the greater politicization of American courts, whether judges are elected or appointed. If the United States Supreme Court met in panels of seven, as the Supreme Court of Canada regularly does, the legitimacy of close decisions on controversial subjects would be questioned by the public and scholarly commentators alike. In the same way, state supreme courts never divide into panels, while Canadian provincial courts of appeal usually sit in three-judge panels and hear major cases with five judges, even in courts with over 15 members. Australia provides further illustrations: appeals in Victoria are heard by the Full Court, which is a three-judge panel chosen from over 20 Supreme Court judges. And India provides an even more extreme case, since its High Courts use the "double bench," a two-judge panel. The Supreme Court of India itself hears most appeals in two-judge panels, including sensitive and important constitutional issues. Even though the Indian Supreme Court now has over twenty members, no more than a handful of cases have been heard by five or more judges in the court's 40-year history.

The structural separation between trial and appellate work is also sharper in the United States. This separation of trials and appeals may have evolved as a product of the absence of central trial courts in the U.S. Superior courts in American states are much more decentralized than their English predecessors, or their counterparts in Canada (even after merger), Australia or India. Interlocutory appeals are rarely used in American procedure, which emphasizes completion of the trial prior to appeal, and reversal of the trial judgment only when error would have altered the result.

This characteristic of American court structure has meant that state superior courts have never (or at least not in the past century) played the same role as superior courts in other common law federations. It may be that decentralizing state superior courts and confining their work to fact-finding rather than law developing has made trial court unification much more plausible in the United States. In turn, this may help us understand how Australian states have maintained three levels of trial courts – supreme, county and magistrate's – when Canadian provinces have merged their two highest trial courts. A central superior court that combines trial work with the law developing work of a final appellate court retains a role more clearly distinguishable from the county court that does fact-finding in major cases but lacks a law development function. As a result, Australian court organization remains much closer to the English model than the American model.

In turn, Canadian court systems are shifting to the American side of the spectrum, with distinct appellate courts in every province (Prince Edward Island recently became the tenth province to create a separate Court of Appeal), and decentralized superior courts. Unification of the trial courts would even more clearly emphasize the division between fact-finding and error correcting, and creation of intermediate appellate courts would also build in a structural separation of law development and error correction functions in the largest provinces. As the Minnesota experience illustrates, and this analysis argues, there is a link or at least a complementarity between one-level trial courts and intermediate courts of appeal, even though provincial attorneys-general unanimously support the former and oppose the latter.

This analysis also suggests that trial court unification, while expanding the variety of work done by former limited jurisdiction judges, may reduce the range of judicial functions formerly done by superior court judges because it accentuates the distinction between appellate work and trial work. If so, an inconsistency emerges, since unification is premised in part on improving quality and morale by offering a greater variety of work. Yet breadth of work, to the extent that is an important value, can be achieved even if trials and appeals are handled by separate courts. In Alberta, for example, superior court judges frequently sit on appeal panels.

The most extensive use of trial judges on appeal panels in the three states examined in Chapters Three and Four occurred in Illinois. However, in keeping with Illinois' emphasis on specialization and indefinite assignments, and deemphasis on rotation, some "temporary assignments" were remarkably long.

Illinois' intermediate appellate court is divided into five appellate districts. The First Appellate District, with 23 justices, hears appeals from Cook County. The four remaining appellate districts each cover five or six circuits, and have five-eight judges (26 in all). During 1988, ten circuit court judges sat on the appellate court by assignment of the state supreme court. Four began their assignments the previous year, two in 1986 and one in 1985. The three others had been assigned continuously since 1977, 1976 and 1970. Two of those judges retired from the Circuit Court in December 1988 and were "immediately recalled" and assigned to the appellate district in which they had each sat for over a decade. Four of the ten judges on temporary assignment became full members of appellate courts by the end of 1988; one was appointed to an appellate court vacancy, two were elected to the appellate court, and one was elected to the state supreme court.

The Illinois experience shows that structural separation of trial courts and appeal courts need not prevent judges from shifting from one to the other. At the same time, however, trial court unification is clearly a reform that fits more comfortably into the American tradition of separating trial and appeal work, and is furthest removed from the English model of a central superior court that combines trial and appeal work. In the same way that a one-level trial court would diversify the work of former limited jurisidiction judges, the assignment of trial judges to appeal panels would enrich the work of general jurisdiction judges.

SUMMARY

This chapter, by highlighting the distinctive context of American court structural reform, reinforces the need to examine the different shape that unified trial courts could take in Canada, and the different impact they could have. On what previous court structure would they be built? How would they be organized? Would they adopt the generalist approach of Minnesota, ensuring that judges of a single class handle the full range of trial work? Or would they opt for specialization by subject matter and complexity, as in Illinois? How would a unified trial court be administered? How would it be articulated with the appellate court? To begin answering these questions, we will focus on the experience of trial courts in three Canadian provinces that have implemented structural reform.

Chapter Six

Structural Reform in Three Canadian Provinces

The best way to examine how trial court unification might occur in Canada would be to examine earlier steps to merge or unify trial courts in various provinces. How do provincial trial courts that have been merged or unified operate in practice today? What do these findings suggest about the relevance of American experience?

The three provinces in which field research was conducted – Alberta, New Brunswick and Manitoba – were chosen because of the scope of their experience with merger and unification. Alberta and New Brunswick were the first two provinces (outside Prince Edward Island) to merge their two section 96 trial courts (as the superior and county/district courts are termed, because they are first mentioned in section 96 of the Constitution Act, 1867). New Brunswick was also the first province outside P.E.I. to implement a province-wide unified family court. Manitoba is the only other province with a fully unified court for the adjudication of family law matters, and has also merged its two section 96 trial courts.

Each of the three provinces also have distinctive features relevant to the issue of trial court unification. Manitoba is pioneering (along with Ontario) the unification of trial court administration, so that management services in Manitoba's two-level trial court system will be more fully integrated. New Brunswick is the only province to attempt a unified criminal court, before its effort was held unconstitutional by the Supreme Court of Canada. [McEvoy, I.D.] And it is currently the province with the broadest acceptance of and support for a one-level trial court. Alberta's merger in the late 1970's had been considered more contentious than any other, until Ontario in 1990, and should therefore represent a hard case—one in which the benefits of merger could be more difficult to achieve.

The seven remaining provinces were excluded for a wide range of reasons. One province, Nova Scotia, has not yet implemented reforms in trial court structure, and despite its small size has the largest number of separate trial courts in any province. Two others, Ontario and British Columbia, only implemented merger as of September 1, 1990.

Quebec was excluded on different grounds. Its court structure is instructive in many ways, since the province never had a system of county or district courts, developing instead the most decentralized superior court in Canada until other provinces began to merge their two section 96 courts in the 1970's. The province has also led the way in many areas of court management, including automation and regionalized administration, and recently reorganized its limited jurisdiction trial courts, combining the Provincial Court, Court of Sessions and Youth Court into a single, multidivisional Cour du Québec. However, this structural reform actually moves the province away from the American Bar Association model of a one-level trial court, since it is part of a strategy of shifting an increased volume and variety of adjudication from the Superior Court to the Cour du Québec. The province is evolving a two-level trial court in which the second level continues to add increments of jurisdiction. Note furthermore that Quebec has in fact a three-level system, since it is the only province to maintain Municipal Courts as separate locally-administered entities.

The three remaining provinces all qualify for inclusion, but were excluded to make the study more manageable. Prince Edward Island's small size reduces the transferability of findings although it was the first province to merge its section 96 courts and unify its family law jurisdiction. Saskatchewan and Newfoundland have both merged their section 96 courts, and created pilot unified family courts in their largest cities (Saskatoon and St. John's); thus both provinces are worth studying even though their experiences are neither as long nor as wide as the experiences of New Brunswick and Manitoba. It will be important to see whether the patterns found in Alberta, New Brunswick and Manitoba are found in Saskatchewan and Newfoundland as well.

ALBERTA

At the beginning of 1991, the Alberta judiciary expressed justifiable pride in the operation of its trial courts. Its superior court, the Court of Queen's Bench, with a complement of 64 judges, could effectively handle complex civil litigation or delicate public issues, and its members were responding to emerging issues of aboriginal justice and gender bias in the courts. The Provincial Court of Alberta shared with its counterparts in British Columbia and Quebec the widest range of Provincial Court jurisdiction in Canada, extending to criminal, family and low-dollar civil claims. Its 114 judges were assigned to three divisions and six regions, and its effective trial coordination project had made Edmonton's criminal courts among the most consistently expeditious in Canada. [Alberta Court Calendar, I.B.]

In this setting, structural reform is a non-issue. The Provincial Court judiciary has maintained its principled support for trial court unification, and Queen's Bench judges have mounted articulate arguments against proposals for a unified criminal court. But there is no sign of government interest in pursuing these changes, and no sign of demands from the bar or the public for structural change. Even the unified family court, first discussed in Alberta 20 years ago, is not on the department's agenda.

In the 1970's, however, Alberta was in the national spotlight because of its court reform initiatives. The Alberta Board of Review into Provincial Courts, chaired by Supreme Court (Trial Division) Justice W. J. C. Kirby, made wide ranging recommendations for the reorganization and upgrading of the Provincial Court. The Kirby Report resulted in appointment of the first Chief Judge of the Provincial Court and construction of court facilities throughout the province. Most important, Alberta became the first province outside P.E.I. to merge its section 96 trial courts, the culmination of a long and sometimes controversial process.

Merger

In 1978, the Alberta Legislature created the Court of Queen's Bench as the province's superior trial court, merging the Trial Division of the Supreme Court with the District Court. On July 1, 1979, the new court came into being as a continuation of the Supreme Court (Trial Division); on June 30 at midnight, the District Court ceased to exist after almost 72 years.

Alberta observers attribute the creation of a single superior court primarily to the determined efforts of one individual, John N. Decore, who became Chief Judge of the District Court of Northern Alberta in 1965 and dedicated himself to upgrading the status of his court in order to make the strongest possible case for merging with the Supreme Court. He successfully encouraged some of the province's most respected lawyers to take appointments to the District Court. Seven of them went on to the Alberta Court of Appeal, and one, Justice William Stevenson, went from the Court of Appeal to the Supreme Court of Canada.

In 1976, Alberta Attorney-General Jim Foster, a reform-minded minister in the Conservative Lougheed government, announced his support for merger, and carried the legislation through to passage. As a practicing lawyer from Red Deer, he had experienced the frustration of having to wait for a Supreme Court justice on circuit from Calgary or Edmonton once a dispute went beyond the jurisdictional limit of the District Court. He was also familiar with the arguments and proposals made by John Decore.

The role of the Attorney General was critical in light of what Chief Judge Decore referred to at the time as "what appeared to be insurmountable difficulties." [Closing Ceremony of the District Court of Alberta, I.B., p. 19] Despite the open opposition of the Chief Justice of the Trial Division and many of his Supreme Court colleagues, the legislation "had the complete backing" of the government, was passed unanimously by the legislature, and confirmed by the necessary parliamentary amendments to the federal Judges Act.

However traumatic the final events leading up to merger, earlier and less controversial reforms consistently upgraded the status and responsibility of the District Court, making merger seem in retrospect inevitable. Decore outlined the history in the June 29, 1979, ceremony to mark the closing of that court:

> *...[I]n September of 1907, nine District Courts were created. The then nine districts were Athabasca, Edmonton, Calgary, Lethbridge, Medicine Hat, Wetaskiwin, Red Deer, Stettler and McLeod [sic], at which time only five judges were appointed. The financial limit was $600. Each District Court was separate, and jurisdiction outside the district was only with the approval of the Attorney General.* [Closing Ceremony, I.B., pp. 16-17]

Thus only two years after Alberta entered confederation in 1905, a set of courts was created "to bring justice to every man's door" [see Sissons, I.B.] and supplement the work of the central superior court. Given the constraints on movement and communication early in the century, "resident judges were the order of the day." [quoting Judge Patterson, Proceedings at the Final Sittings, I.B., p. 13] A review of the early District Court judges in Southern Alberta shows that not only Calgary, but also Macleod (as Fort Macleod was then known), Lethbridge, Medicine Hat and even Hanna had resident judges.

Reorganization, slow at first, always went in the direction of expanding the jurisdiction of the District Court and the geographical scope of its individual judges.

> *In 1933 the nine District Courts were formed into two districts, the District Court of Northern Alberta and the District Court of Southern Alberta, each with its own Chief Judge. The boundary line dividing the north and south was just a little bit south of Red Deer.... In 1951, the dollar limit was increased from $600. to $1,000., and in 1963 from $1,000. to $2,000. in civil actions...* [Closing Ceremony, I.B., p. 17]

Thus, when Decore went on the bench in 1965, the civil jurisdiction of his court stood at only $2,000. Change accelerated in the next decade as

> *...very significant and rapid changes took place.... In 1971 the dollar limit was removed completely under the then Attorney General, the Honourable Edgar Gerhart. This clearly opened the way towards amalgamation, and it was clear that the Government of that day was contemplating, or was favoring, merger. In 1975, the Honourable Merv Leitch, the Attorney General who, under a different Government, followed Mr. Gerhart, brought about the [October 1, 1975] merger of the two District Courts into one, with province-wide jurisdiction [and both a Chief Judge and Associate Chief Judge]. This in effect opened the door wider towards amalgamation. It was also in 1975 that the District Court of Alberta was made a Sessions Court, thereby authorized to hear jury trials. [p.17]*

Accompanying these statutory changes were parallel changes in court rules and practices. As early as 1916, District Court judges "received patents from the Government of Canada as local Judges of the Supreme Court with the like powers of a Supreme Court Judge," but court rules "generally forbade the exercise of these powers, except where there was consent on the part of both parties." The limiting rules "had largely been eliminated" by 1974, "and eventually an amendment was passed by the Legislature purporting to render clear that as a local Judge, a District Court Judge has all the powers of a Supreme Court Judge with some possible exceptions of criminal offences listed under Section 427 of the Criminal Code and stated cases." [pp. 17-18]

Thus, by the time Foster proposed a formal merger of the two trial courts, they had "virtually the same jurisdiction."

> *So that the District Court of Alberta virtually became a superior court with general jurisdiction with no limitation of its powers in a jurisdictional sense, either in terms of the subject matter or in terms of geography.* [p.18]

At the time of merger, the Supreme Court had 17 justices in its Trial Division, all resident either in Edmonton or Calgary. The District Court had 20 judges resident in three locations (Edmonton, Calgary and Lethbridge). The 1979 federal enabling legislation authorized a Chief Justice and 38 other justices for the merged Court of Queen's Bench.

By the time merger was implemented in 1979, Chief Judge Decore was eligible for supernumerary status, and he took that status after only 60 days on the new Court of Queen's Bench. The Associate Chief Judge of the District Court, Roger Kerans, was elevated to the Court of Appeals. At the same time, the last Chief Justice of the Trial Division, James Valentine Milvain, also retired. He had been an open opponent of the merger, but his retirement came only as he reached the mandatory age of 75. Thus the new court would also begin with a new chief justice. The person selected was Justice William Sinclair of the Court of Appeal, a likeable and reserved man who commanded the respect of Queen's Bench judges from both of the previous courts, and was able to ensure a smooth transition to the new court.

Interview respondents, especially those who served on the District Court at the time of merger, stressed the absence of rancor and bitterness following merger. Remarks could be heard initially, but they were quickly seen as inappropriate. While to this day, court participants and observers in other provinces remember Alberta as the site of the most contentious merger process until Ontario in 1989-90, Alberta judges report again and again how little conflict occurred, and how briefly it endured.

The Early Years of the Merged Court

The new Court of Queen's Bench had resident judges in four locations, adding Red Deer in central Alberta to the three cities that previously had resident District Court judges. The standard set at that time and maintained to this day is that at least two judges should reside at a court centre before it is entitled to a resident judge. This standard is designed to avoid one-judge centres, on the assumption that a community with only enough business for a single judge is best served by a variety of sitting judges on circuit.

The constraints on transportation and communication that led Alberta to appoint resident judges in small centres no longer existed. The District Court itself had grown increasingly more centralized in Edmonton and Calgary for decades before merger. It has also been suggested that the collapse of rural law practices during the depression contributed to the demise of resident judges in those areas.

The Court of Queen's Bench developed scheduling practices that differed in important ways from those of the District Court and the Trial Division, in that the court rather than the bar controlled the assignment of cases to judges. Before merger, reported judges who sat on the two previous courts, if counsel could agree on a judge they preferred for their case, they could ask to be put on his calendar. This system, reminiscent of the pre-unification scheduling process in Sioux Falls, South Dakota, is considered antiquated and potentially unfair today. Ironically, the elimination of the old system that allowed greater freedom to select a trial judge may be one reason for increased interest in alternatives to adjudication (e.g. arbitration) in which the parties can select their judge.

Former District and Trial Division judges who see fewer cases in their favoured specialties agree that a more systematic, court controlled scheduling process is preferable today, and there is no indication that the bar has concerns similar to those expressed in Minneapolis about judges without suitable background or expertise handling complex civil trials. The absence of these concerns may reflect the differences between civil case assignment in Minneapolis and Alberta. While court control exists in both jurisdictions, Hennepin County randomly assigns civil cases to individual judges at an early stage, following an individual calendar system, while Queen's Bench assignments occur only after the parties have filed a certificate of readiness, following a master calendar system. In the master calendar system, the judge responsible for case assignments can deliberately choose a more experienced judge to try a complex case. Given the discretion that a master calendar system places in the hands of an administrative judge, it is one of the most sensitive non-adjudicative functions a judge possesses. Its careful and equitable exercise can ensure a high quality of service to litigants, and healthy morale and intellectual growth for the trial judges. In turn, however, even the perception of inappropriate favouritism can undermine the collegiality so essential in any court.

On matters of seniority, the Court of Queen's Bench established a pattern followed in later mergers. Because the superior court was continued as a new court, and the district court abolished, the superior court judges maintained precedence over their new district court colleagues, regardless of how long an individual judge had been on the bench before merger. Thus for example, a District Court judge appointed in 1977 and elevated to the Trial Division early in 1979 would be senior to a District Court judge appointed in 1965 but elevated following amalgamation on July 1, 1979.

Interviews suggested that the tensions that could arise from this distribution of status did not exist in practice. While some benefits can accrue from seniority, they were few enough, and were allocated with sufficient sensitivity, to avoid conflict between the high-seniority former Trial Division judges and the low-seniority former District Court judges. Even two Queen's Bench judges who began as police magistrates (in Edmonton and Calgary respectively) before going to the District Court and then being amalgamated into the present court, did not recollect having any concerns about their new junior status.

In retrospect, it may be that former District Court judges saw sufficient gains in their new status as superior court judges that the seniority ranking would be at most a minor irritant. Even if seniority affected case assignments or circuit sittings, the new work would constitute a gain in the breadth and depth of their responsibilities. On the other hand, to the extent that seniority might affect travel or case assignments of new judges a decade later, the practice might be more critically received, since the current generation of judges is appointed directly to the Court of Queen's Bench. These new judges may be less patient if they believe seniority rather than competence or expertise governs the distribution of work.

Queen's Bench in Action

To understand how the merged court compares with its separate predecessors and with unified trial courts in the United States, we first need to know more about the current operation of the Court of Queen's Bench. Where and when are sittings scheduled? How are judges assigned? How local and how specialized are the judges?

While the Court of Queen's Bench has resident judges in four centres, it maintains permanent court offices (registries) and schedules regular sittings in eight additional centres, holds regular sittings in another three, and sits as required in yet another three – a total of 18 sitting points. In practice, a year can go by without a single Queen's Bench judge sitting in Hanna or Camrose, and circuits visits are rare at other points as well. Barrhead scheduled no dates for trials to open in 1991, Lloydminster had only three, Hinton six, and Fort Macleod, with the least business of any community with a Queen's Bench registry, only seven.

Table 6-1 summarizes the formal schedule set out for 1991. It shows that only half the authorized sitting points (9 of 18) have scheduled more than one date per month for the start of trials. Lethbridge, with two resident judges, schedules an average of two sittings per month, less than Wetaskiwin, which has no resident judges. Grand Prairie and Peace River in northwest Alberta are the next busiest. St. Paul, north and east of Edmonton, has the most sittings of any location without its own registry, and more than four locations with registries. St. Paul's heavier business does not reflect the preference of Queen's Bench judges; the town is by reputation the least desirable circuit point in the province, primarily because it has no scheduled air service and is 210 kilometres from Edmonton on two lane roads.

Wetaskiwin, just south of Edmonton, is well served by judges on circuit. Its close proximity to Edmonton makes it possible to obtain a judge by noon

Table 6-1

Number of Judges and Scheduled Sitting Dates by Court Location, Alberta Court of Queen's Bench, 1991

Sitting Point	Number of Resident Judges	Number of Dates for Opening of Trials
Edmonton	31	Continuous
Calgary	29	Continuous
Red Deer	2	Continuous
Lethbridge	2	24
Wetaskiwin	0	27
Peace River	0	20
Grand Prairie	0	18
Medicine Hat	0	17
St. Paul*	0	16
Fort McMurray	0	11
Vegreville	0	11
Drumheller	0	10
Fort Macleod	0	7
Hinton*	0	6
Lloydminster*	0	3

Notes: Derived from Alberta Court Calendar, January 1, 1991 to June 30, 1991, published by the Alberta Attorney General.

*Sitting point with no Queen's Bench registry.

Three sitting points are not shown because no regular trial dates are set there in 1991.

for a trial if overbooking has occurred, given both the likelihood that the collapse rate in Edmonton will free up a judge, and the willingness of that judge to travel to Wetaskiwin. Since the relatively short drive makes it a more desirable circuit point than those that require an overnight stay, judges frequently volunteer to sit there. Thus the trial coordinator in Wetaskiwin has been able to reduce pretrial delays through deliberate overbooking and the cooperation and support of the Associate Chief Judge's office in Edmonton.

In contrast, Grand Prairie and Peace River, less than 200 kilometres apart, must be served on a fly-in basis by Edmonton judges, suggesting that these communities may be the next area to press for resident judges, even though population growth may be greater in the Medicine Hat area in southeast Alberta, which is 150 kilometres from Lethbridge.

The current pattern of sittings in the Court of Queen's Bench suggests that judicial services are as readily available outside the two major centres as they were before merger. The cities formerly served by the District Court have retained that service, resident judges were added at Red Deer, and frequent sittings are scheduled at a number of other centres. At the same time that population growth has improved accessibility in some centres, however, population stability or decline appears to have reduced the court presence in other communities.

A sharper contrast can be drawn between the past and present pattern in Alberta on one hand, and that of trial courts in the United States. The states examined in Chapters Three and Four would have been likely to place resident judges in perhaps three or four additional districts, regions or circuits beyond the four existing locations. At the same time, however, those states would have been far less likely to move judges from one district or region to another. Alberta judges are regularly on the move, not just to serve fly-in locations too small for a resident judge, but also to rotate between Edmonton and Calgary.

While judges who reside in either of the two major cities spend the greatest share of their time at their home base, they sit in the other city at least twice a year, in order to ensure the kind of continuous contact that is believed to reduce parochialism and ensure a necessary degree of uniformity in application of the law. While this rotation allows healthy interaction among judges in the north and south of the province, the two cities' courthouses retain their distinctiveness. Numerous respondents pointed to differences in the nature of the two courts' work, with Calgary attracting commercial litigation as a centre for corporate head offices and Edmonton attracting the public law issues of a government centre. Others described differences in what has come to be called the local legal culture, with Edmonton seen as more litigitous and Calgary lawyers more open to negotiation (horse trading?). Judicial cultures also vary, as recalled by the Calgary judge whose colleagues discussed sports events over lunch, while the Edmonton judges would even hold evening seminars on new developments in the law.

An examination of the 25-week assignment schedule drawn up for Queen's Bench judges for January 7 to June 28, 1991, allows a number of comparisons to be made with state trial courts in the United States:

(1) Judges are assigned on a master calendar basis, in contrast to the more frequent use of individual calendars in both large and small centres in the United States.

(2) Master assignments generally change on a weekly basis, much more frequently than in the United States. One junior judge in Calgary was assigned to that city for 15 of the 25 weeks – seven weeks in criminal, six weeks in civil and two weeks as duty judge – without ever spending two consecutive weeks with the same assignment.

(3) Specialization is avoided regardless of seniority or previous experience. Judges in the two major cities are generally expected to split their time evenly between civil and criminal assignments. Even the most junior judges, who may have come out of more specialized civil or criminal practices, or have done solicitor's work rather than litigation, are immediately given a mix of assignments (with one week allocated to a new judges' seminar several weeks after presiding over a full range of Queen's Bench work).

(4) Seniority has some but not extensive impact on assignments. The impact is most easily visible for supernumerary judges, who have taken "senior status" (to use the U.S. term), stepping down from a full-time judgeship prior to age 75, receiving full salary but sitting for fewer weeks. The eight supernumeraries at the beginning of January were given 8-9 week assignments, generally not involving any travel outside either Edmonton or Calgary. (The one exception, Justice "Red" Cavanagh, was assigned 12 weeks in four locations, but died early in the year from a long illness that took his strength but never his dedication.)

Judges with more seniority appear to be able to avoid travel to remote centres if they wish. They are still expected to travel, but may go to the other metropolitan centre or a circuit point in their half of the province. At the same time, even a more junior judge is not required to travel more than four weeks out of 25, unless assigned to a long trial at a circuit point. Thus while the newest appointee in Edmonton was expected to travel to Grand Prairie, Fort McMurray and St. Paul, that assignment, combined with one week in Calgary, produced the same total travel time as the most senior judge in Edmonton, who spent two weeks in Calgary and one each in Grand Prairie and Peace River.

Seniority clearly plays an important role in assignment of Queen's Bench judges to the Court of Appeal to hear sentence appeals. In a procedure unique in Canada, Alberta's sentence appeal panels are made up of two trial judges and one appeal judge. The panels were scheduled for six three-week periods in the first half of 1991. The 36 weeks of Queen's Bench judge time was assigned entirely to seven judges, all of whom had at least ten years seniority. Six weeks went to a supernumerary judge, and nine weeks to the most senior of the sitting judges. Only three weeks went to a woman judge (only one of the court's nine women appointees had served over ten years). While these assignments are longer and less evenly distributed than any others, they still provide experience with appellate work that is not available to generalist judges in Minnesota and South Dakota, and is available in Illinois only through much longer assignments.

It may be that longer assignments of more senior judges to sentence appeal panels is done to ensure greater uniformity of sentences. If so, it remains surprising that a judge with less seniority is not also included on each panel, to ensure that old knowledge is passed on and new knowledge is brought forward.

(5) Four or five weeks out of 25 are set aside as judgment weeks, when no cases are assigned, and research and writing on reserved matters can be completed. This time allotment is not as high as in superior courts in other large provinces, but is substantially more than state trial judges in the United States. (It appears that in common law countries, where judgments have the force of precedent, judges are allocated fewer days for judgment writing than in civil law countries where judgments lack the force of precedent but written reasons are required by law.)

In summary, scheduling practices are designed to reinforce the concepts of the generalist judge and the collegial court. Ironically, the one American jurisdiction that, like Alberta, maintained the most varied case assignments in its largest urban courts was Minnesota, the most fully unified of the three state trial courts examined in this report – and thus the least like Alberta's sharply differentiated two level trial court system. In practice, Minnesota's case mix is even more varied, since a substantial minority of trial court workload involves high-volume, low-dollar and low-penalty cases not found in Alberta's Court of Queen's Bench. In turn, Alberta's Provincial Court is more specialized still, since criminal work is separated from family and youth work, and from civil work.

Another development in the Court of Queen's Bench during the decade following merger has been the expansion of the masters. Masters had had only limited use for chambers work and pretrial motions in the old Supreme Court, and their numbers and responsibilities increased after merger. There are currently seven masters, three in Edmonton and four in Calgary, and they have added responsibility for enforcement of family law orders made by Queen's Bench judges.

Evaluating Merger in Alberta

Interviewees, no matter how nostalgic their view of a time past, consider merger of Supreme and District Courts as a worthwhile and beneficial step in the administration of justice in Alberta. When questioned about changes in accessibility, efficiency and quality, respondents either cited gains or indicated that merger did not have the negative effect its detractors feared.

Table 6-1 and the related discussion suggested that accessibility remains as high or higher than when two courts were in operation rather than one. While Saskatchewan practitioners have expressed fears about the closure of local courthouses in that province, no similar concerns arise in Alberta, partly because Alberta District Court judges were less dispersed than their Saskatchewan counterparts for many years prior to merger. Increased flexibility in the assignment of over 60 judges in a single provincewide court should mean gains in efficiency, and many respondents attributed efficiency gains to merger. Data limitations prevent me from going beyond the perceptions of participants to a more systematic quantitative analysis of changes over time in the number of actions commenced and trials held, and in the pace of civil and criminal litigation.

Alberta's trial courts have the reputation of being relatively free from delay, but no data are available to confirm this or provide useful comparisons with other provinces. Examination of caseload statistics suggest that civil actions rose from the 1970's to the 1980's and then declined, reflecting perhaps the end of what Alberta officials euphemistically term the "foreclosure boom" of the early 80's. Criminal trials have clearly increased. Data on civil trials are inconclusive, since the definition of the category has changed over time; available data suggest that there has been no increase in trials of civil actions over a 20-year period, but this may be a result of increasing the dollar limit on civil actions in Provincial Court. Thus a mathematical formula based on cases per judge or trials per judge may show little difference, or even negative results; however, to the extent that this formula fails to take into account a possible increase in long and complex trials, it would yield invalid results.

Changes in the quality of justice are most difficult to identify, let alone measure. The fear that merger would reduce the quality of justice by creating an excessively large court producing a less well crafted product has not been realized. Nor has the fear that a larger court with less exclusive jurisdiction and lower status than the earlier Supreme Court would be unable to attract high calibre candidates. No evidence was found that creation of the merged court has discouraged excellent candidates from seeking or accepting judicial appointments. The increased number of women appointees (six of the most recent eleven appointments made as of mid-January 1991) indicates that the expanded pool of practicing lawyers that has accompanied the growing participation of women in the legal profession should enhance the quality of justice in Alberta.

The Uncertain Future of Trial Court Unification

While the results of more than a decade of experience with merger produced universal praise among Alberta's section 96 judges, whether they were opponents, supporters or skeptics of Attorney General Jim Foster's 1978 legislation, those who answered my questions were always quick to argue that the conditions that made merg[illegible]uccess were quite different from the conditions f[illegible]urrent proposals for a unified criminal court. Even Foster himself expressed strong skepticism about the new proposals, questioning whether they would accomplish what their advocates hoped.

As District Court Chief Judge John Decore stated on the eve of merger, a decade of change had virtually obliterated the distinction between the workload of the two trial courts. Furthermore, a determined effort to improve the quality of appointments to the District Court bench had produced a generation of judges whose work could deflect any cheap shots from the higher judiciary.

The Kirby Report in the 1970's held out hope to Provincial Court judges that similar conditions would evolve in their case, and unified family and criminal courts would emerge in the 1980's. As the immediacy of structural reform faded, and the priorities of government and judiciary shifted, the emergence of further changes in court structure from within the province has come to appear less likely. Several reasons exist for the current situation in Alberta:

(1) Reformers within the courts have shifted their focus from structural change to responsive problem-solving, parallel to the shift in the United States during the 1980's. For example, Queen's Bench Justice Allan Cawsey, a national spokesman for the unified criminal court when he was Chief Judge of the Provincial Court in the late 1970's, completed a public inquiry into aboriginal justice in the province in 1990. His report emphasized the need for increased accessibility of trial courts at both levels rather than structural unification. The inadequacies of the justice system as it affects native people were seen as so pressing that immediate operational changes took precedence over long term reform of court structure.

In Calgary, delays in bringing Youth Court cases to trial have raised the spectre of dismissals under the principles enunciated by the Supreme Court of Canada in its October 1990 judgment in Regina v. Askov. As a result, the Youth Court scheduled summer sittings for the first time in courtrooms in Calgary's Court of Queen's Bench. Rather than argue over turf, the two separate courts joined together in a small but important cooperative effort.

(2) There has been a hiatus in long-term planning by government ministers and officials responsible for court administration. By early 1991, there was no senior administrative official in the Department of the Attorney General who was solely responsible for continued effective operation of the Alberta courts. The Assistant Deputy Minister at that time headed the Court and Property Services Division, which included not only the courts but also the province's land title system. The position of Executive Director of the Court Services

Branch had been vacant for a number of months after the previous Executive Director had moved to another ministry. It was not until later in 1991 that an Acting Executive Director was named.

It may be that the department is in the process of flattening the administrative hierarchy in the courts, with communication going directly to headquarters from a larger number of district managers. To the extent that these changes would allow district and local officials to respond more quickly to local needs, and reduce central bureaucratic controls, the courts are likely to benefit. For example, court staff would be able to respond more effectively to short-term needs of the judiciary. However, if the Court Services Branch loses the capacity to undertake strategic planning for the court system as a whole, the long-term effects could be serious indeed. Unless the department is able to anticipate as well as respond to the needs of the courts, new initiatives will atrophy and the ability of the courts to serve the public over the long term will suffer.

(3) The Provincial Court has grown increasingly specialized, diverging further from the generalist model of the Court of Queen's Bench. Specialization in Provincial Court has long been valued, especially in handling sensitive and difficult family disputes. But as the caseloads of local Provincial Courts have grown, specialization has been facilitated and rotation appears to have become less common. Instead of a new generation of Provincial Court judges with criminal, civil and family law background, able to argue either for a unified court or a place for themselves on the Court of Queen's Bench, specialized judges have been less attractive to federal appointing authorities and their advisory screening bodies. Despite the value of judicial experience, and the ease with which capable Provincial Court judges could take on new responsibilities on Queen's Bench, the fact that they spent ten years on the bench rather than in an increasingly mature and responsible law practice has weakened their chances for elevation. These circumstances could in turn harm recruitment for the Provincial Court bench in the future.

(4) Differences in Alberta's current federal and provincial judicial appointment processes have threatened to compound existing differences. When the federal government established provincial screening bodies to pass on prospective nominees, the Alberta committee established strict criteria for consideration (including some criteria critics felt were applied too mechanically). In contrast, the provincial Judicial Council adopted a "minimum standards" approach in recent years; instead of recommending the one or two best qualified applicants, the Council has simply eliminated the least desirable. In effect, one has needed a "A" to get on the federal list, but only a "C" for the provincial list.

As a result, provincial authorities have been able to use wider discretion in making appointments, and have not consistently chosen appointees whose strength would earn respect and recognition from other courts. This could in turn reduce further the likelihood that Provincial Court judges will be elevated to the superior court, not only affecting the morale of the Provincial Court bench, but depriving the superior court of a perspective and set of experiences largely missing from that body. Now that the provincial Judicial Council has shifted to a four-category rating scheme for Provincial Court judges (highly qualified, qualified, not qualified, and not qualified at this time) under its new chair, retired Alberta Law Dean Wilbur Bowker, perhaps a new pattern will be established.

In summary, current conditions and practices in Alberta, taken together, have kept proposals for change in court structure off the political agenda. While this result may be welcomed by opponents of the unified criminal court, some of these same conditions may weaken the ability of the province's trial courts to respond effectively to future public needs. There is no sign that the current Attorney General will take any action to implement the June 1990 resolution of provincial attorneys general that he supported at the time. Were he to do so, he would face opposition from the criminal defence bar as well as the superior court judges; support from the Provincial Court judiciary would be unlikely by itself to tip the balance.

NEW BRUNSWICK

New Brunswick is smaller in population and much smaller in area than Alberta, but the dispersion of its population is such that New Brunswick's Court of Queen's Bench has resident judges in eight centres – double the number in Alberta. This alone suggests how different the province is, and how different the operation and needs of its trial courts could be as well.

The History of Court Reform

For the past generation, New Brunswick has consistently been in the forefront of reforms in court structure. It created a provincially administered Provincial Court in 1967, earlier than any English-speaking province, when it replaced County Magistrates with Provincial Court judges. This initiative in the justice field meshed with Premier Louis Robichaud's "equal opportunity" program, which shifted major functions from local to provincial government as a means to improve the lot of the province's Acadian population. A decade later, New Brunswick merged its two section 96 trial courts, the Queen's Bench Division of the Supreme Court and the County Court, into a single Court of Queen's Bench. New Brunswick's merger went into effect on the same day as Alberta's. During the same period, Fredericton, New Brunswick, became the site of one of four unified family court pilot projects (along with Hamilton, Ontario; St. John's, Newfoundland; and Saskatoon). Soon New Brunswick became the only one of the four to extend its pilot project province wide, and became the first province outside P.E.I. to place all family law matters in a single trial court.

By the early 1980's, all civil and family matters were heard in the Court of Queen's Bench (small claims on the civil side were heard by law-trained clerks in Queen's Bench rather than by judges in Provincial Court, as in Alberta). This left the Provincial Court as exclusively a criminal court, the only one in Canada. The Provincial Court did not have a monopoly on criminal court work, since jury trials remained within the sole jurisdiction of the Court of Queen's Bench. In practice, however, the number of accused persons who elect to be tried by judge and jury or by judge alone in Queen's Bench is small, both in absolute numbers and on a per capita basis. Thus the provincial government moved to complete the transformation of its trial courts from a hierarchically-based system to a subject-matter organization by proposing legislation to unify all criminal matters in the Provincial Court.

Unlike current proposals for criminal court unification, which assume that judges would be appointed by the federal government, New Brunswick's proposal was that the unified criminal court be made up of provincially-appointed judges. While a provincial government could not shift the traditional jurisdiction of a federally-appointed judge to a provincially-appointed judge, criminal law is under federal jurisdiction, so that the federal parliament would have to authorize the shift before the provincial legislature could put the new court in place. And no precedent existed to prevent the federal parliament from doing so.

Nevertheless, the constitutional validity of New Brunswick's proposal was immediately questioned, so a cabinet order of January 22, 1981, referred the issue to the New Brunswick Court of Appeal. On September 18, 1981, a three-judge panel speaking through the Chief Justice unanimously concluded that there was no basis to limit the power of the federal parliament. The most direct statement on this issue ("Section 96 does not inhibit the federal Parliament...") came from a 1970 Ontario Court of Appeal judgment by then Justice Bora Laskin. Concurring in the New Brunswick judgment was Justice Stuart Stratton, who later became Chief Justice, and Justice Guy Richard, who would soon leave the Court of Appeal to become Chief Justice of the merged Court of Queen's Bench.

An appeal followed to the Supreme Court of Canada, and that court unanimously reversed the New Brunswick Court of Appeal in the case then styled McEvoy v. Attorney General of Canada et al. The Supreme Court unequivocally rejected the notion that the federal parliament could do what the provincial legislatures could not – undermine the position of the superior courts as guaranteed under section 96. While the Court's reasons bore no author's name, most commentators assume that they were written by the Chief Justice, Bora Laskin.

Following the judgment in the reference case, further changes in court structure ground to a halt. There is no indication that the province examined other alternatives, for example a modified unification by which judge alone trials would take place in Provincial Court, as they do in Quebec, or even jury trials elected by the accused (that is, for offences other than capital murder). It would be another six years before new proposals for criminal court unification would be made by the Ontario government and the federal Law Reform Commission, both premised on the notion that a unified criminal court would be a superior court whose judges would be appointed by the federal government pursuant to section 96. The current generation of proposals has not been constitutionally challenged, but has been vigorously opposed on other grounds.

The defeat of criminal court unification in 1983 shifted attention away from the other reforms in court structure that have been successfully implemented in New Brunswick. A review of these changes will provide an understanding of the development and current operation of the province's trial courts, an essential step in seeing what might happen under a future scheme of criminal court unification.

Merger

Steps toward merger of New Brunswick's County and Supreme Courts followed very closely in time those taken in Alberta. New Brunswick Attorney General Paul Creaghan (now a Queen's Bench justice in Moncton) appointed a study committee on September 25, 1976, chaired by senior counsel Horace Hanson and consisting of two members – the Chief Judge of the County Court, Richard Miller, and the Chief Justice of the Supreme Court (Queen's Bench Division), Adrien Cormier. Their report, submitted May 17, 1978, made a number of recommendations, with merger the principal one. The report's recommendations, notes the letter of transmittal, "are the majority opinions of the Committee." No minority views were submitted; the final page of the report notes simply that "Mr. Justice Adrien J. Cormier, a member of the Committee, has not signed the report." [I.D., p. 126] Merger legislation was passed soon thereafter, and federal enabling legislation the following March (for Alberta, New Brunswick and Saskatchewan).

At the time the Hanson Committee proposed merger, the two New Brunswick trial courts were quite small. The Queen's Bench Division had recently been increased from four to seven justices, resident in three centres (Fredericton, St. John and Moncton), and the County Court had been increased from five to seven judges. [Hansen Report, I.D., p. 68] The federal enabling legislation passed in 1979 [1978-79 Stat. Can., c. 11] established 15 trial judgeships, an increase of one over the 14 positions most recently authorized for the two previous courts in 1975.

Pre-merger reductions in the number of judicial centres would also mean that merger would not take former County Courts out of any communities. Following a 1966 reorganization, judges of both section 96 courts sat in a total of eight judicial centres, down from 15 shiretowns in which court had previously been held. [Hansen Report, I.D., p. 69] Merger would therefore mean that all eight centres could have a resident judge – and a superior court judge at that.

Family Court Unification

Family courts were undergoing change in the 1970's even as merger progressed. Reorganization began in the Provincial Court, where family matters were shifted to specialized judges rather than integrated into the caseload of judges primarily responsible for criminal matters. Once that experiment was under way in the western half of the province, the federal government encouraged all provinces to submit proposals for pilot projects in which federally appointed judges would hear all family law matters in a particular judicial district, and the projects would be evaluated by federally funded researchers.

New Brunswick joined the effort, and a Provincial Court judge from Woodstock was appointed by the federal government as Unified Family Court judge in Fredericton. Within two years, the province would extend the unified family court throughout the province, as a division of the new Court of Queen's Bench. The pilot judge still sits today in Fredericton as Justice of the Court of Queen's Bench (Family Division).

Under current practice, Queen's Bench judges receive appointments to either the Trial Division or the Family Division. Before they can sit in the other division, the Chief Justice must give them the authority to do so. While the Chief Justice does this on a routine basis, he rarely assigns judges across divisions, except in the centres with only one resident judge. The result has been a highly specialized trial court in which civil and family work remain largely segregated.

An interesting constitutional conflict arose early in the work of the Fredericton unified family court. At the time that unification of family law matters was first advocated, reformers argued that criminal charges arising within a family unit, chiefly intra-familial assault, should be included within the work of the unified, specialized family court. The argument was that resolution of these criminal matters should be considered along with resolution of the civil dispute. However, a case arose involving a charge for which the accused could have elected trial following a preliminary hearing if the case had arisen in Provincial Court, but could not do so in the unified family court. Counsel for the accused challenged the inability to obtain a preliminary, and won. From then on, criminal matters even within the family were handled along with all other criminal matters in Provincial Court and, as required or elected, in the Trial Division of the Court of Queen's Bench. Ironically, current reforms in the handling of family violence advocate the use of the traditional criminal process to emphasize the seriousness of the charges. Thus the successful legal challenge to the criminal jurisdiction of New Brunswick's unified family court actually brought that court in line with currently recommended practice.

The Merged Court in Operation

The dispersed nature of the New Brunswick Court of Queen's Bench is apparent in Table 6-2, which shows the current distribution of resident judges among the eight court centres in the province. Even the largest centre has only one-fourth of the province's resident judges (6 of 22 permanent judgeships [27%], or 7 of 24 if supernumerary judges are included [29%]).

This dispersion makes resident judges with broad jurisdiction relatively accessible across the province. However, it could have two negative side effects. First, it could produce inefficiencies if local resident judges have no matters ready for trial and cannot easily be reassigned to a different location. The collapse of a week-long civil trial in half the centres of the province could leave the resident Trial Division judge with precious "down time" unused. Second, it could promote parochialism and reduced uniformity of law and practice around the province. Alberta required enough work for two Queen's Bench judges before allowing resident judges in smaller centres. Yet three of New Brunswick's centres have a single judge, and a fourth has only one judge assigned to civil and criminal matters. Only two centres have more than one judge handling family law matters. Under these circumstances, common in the United States but rare in Canada, lawyers and litigants might find themselves appearing continually before the same judge.

The Chief Justice and his colleagues are well aware of these potential problems, and reflect their concern in a number of practices readily observed in the course of field research. Resident judges are regu-

Table 6-2

Number of Resident Judges by Court Location, New Brunswick Court of Queen's Bench, July 1991

Judicial District	Trial Division Judges	Family Division Judges	Supernumerary Judges	Total Judicial Complement
Moncton	4*	2	1	7
Saint John	3	2	0	5
Fredericton	2	1	1	4
Bathurst	2	1	0	3
Edmundston	1	1	0	2
Campbellton	1	0	0	1
Newcastle	1	0	0	1
Woodstock	1	0	0	1
Total	15	7	2	24

*Includes Chief Justice.

larly on the move to other centres for temporary assignments. For example, a judge from a smaller northern centre was trying a controversial criminal matter in Moncton while I was there, and a Moncton judge was assigned in turn to another centre. Judges must often go to smaller centres to handle cases in which the local judge may have a conflict. One judge joked that when he moved to take up a judgeship and bought a house that required extensive remodelling, he subsequently found himself unable to handle most mechanic's lien actions in the district.

The temporary shifting of judicial resources to promote their more effective use is well accepted in New Brunswick, but remains necessarily limited in its impact. The number of case dispositions per judge, or the amount of overbooking of trials, is still likely to be lower in a set of small centres than in a single large centre. Not only are more judges and courtrooms available in the same building or set of buildings, but the local bar is likely to be larger and more diverse as well. Coordination problems are greater, but productivity in quantitative terms is potentially much higher.

While productivity, for example in terms of disposition rates, may not be as high in a more dispersed trial court such as New Brunswick's Queen's Bench, other measures of administrative effectiveness may be stronger. Thus for example, trial delay could be significantly lower in the province if judges are not as pressed with the high volumes of large trial courts and can quickly take up a case for disputing parties who would otherwise resort to a series of time-consuming preliminary motions before a duty judge who is the only person available on short notice. In fact, a study of the pace of criminal litigation in ten cities in three provinces showed that New Brunswick's Court of Queen's Bench had substantially less delay than its counterparts in British Columbia and Ontario. [See Tables 8-1 and 8-2 below.]

Turning from questions of efficiency to those of quality, to what extent has the New Brunswick court been able to overcome the isolation of one- and two-judge courts? While collegiality is difficult both to measure and to link to the quality of adjudication, it appears to be present to a high degree in the Court of Queen's Bench. Judges talk to one another about their cases, both in person and by telephone. They seek advice from one another. On one occasion, one of my interviews was cut short so that a judge who had called a brief recess could consult his colleague on a point at issue. The next day, in another centre, a judge noted a sensitive legal problem faced by a colleague 100 miles away that they had just talked about the previous afternoon. To the extent that such discussions go on routinely and without regard to intervening distances, the possibility of more consistent practices increases.

The discussion and illustrations here have focused on the work of Trial Division rather than Family Division judges. A similar examination of Family Division work should be done, since there is so little overlap across the two divisions.

It must be observed that the lack of overlap has produced some anomalous if not bizarre practices. If a Family Division judge must disqualify himself or herself from a case, there is no other Family Division judge available in most localities to decide the case. While it would appear to be cheaper and faster for the matter to be handled by the Trial Division judge resident in that locality, normal practice is to bring in a Family Division judge from out of town. The same practice is normal on the Trial Division side.

This practice is justified because of the specialized expertise sought in family law matters. The priority reformers sought for family law clearly requires recognition of the distinctive needs of family litigation. Conversely, however, by turning the need for specialized expertise into a rationale for segregating subject matter, both court efficiency and family law priority may suffer.

As the Family Division matures and new appointments are made, it faces the prospect of being perceived as a first stop. Lawyers may accept an appointment there in hopes of eventually receiving a second appointment, this time to the Trial Division. In fact, this has already occurred, and may be endemic to the second generation of appointments to unified family courts.

It is clear that the benefits gained by the public from specialized family law judges do not require the degree of separation between civil and family litigation that currently characterizes the Court of Queen's Bench. In practice, the absence of even occasional rotation in assignments could lead to the reemergence of two tiers of judges within what was intended to be a one-level trial court.

The issue raised here could be dealt with by occasional assignments across divisions. More fundamentally, it may be appropriate for appointments to be made only to the Court of Queen's Bench, and not to a particular division. Government would still have to be aware of the court's needs for an appointee with knowledge of particular areas of litigation, but appointments free from either a Trial or Family Division label could allow incumbents to shift areas of interest over time, and provide more encouragement to seek out continuing judicial education.

A New Approach to Small Claims

The most controversial initiative to hit Queen's Bench in 1990 was the provincial government's decision to change the way small civil claims are adjudicated. All civil matters have been within the jurisdiction of the Court of Queen's Bench since merger, but claims up to $1,000. were adjudicated by legally trained clerks of court. Either a full-time clerk would handle small claims along with other duties, or a part-time clerk, perhaps a senior lawyer in the community, would do only small claims adjudication. As of January 1990, however, legislation required that all civil claims regardless of dollar amount be heard by a Queen's Bench judge.

The new practice engendered opposition from the judges, not simply in response to an increase in workload, but as a result of the different nature of small claims litigation. Because an individual plaintiff who brings a small claims action is normally not represented by counsel, the courtroom dynamic changes. The judge must shift from a more formal adversary procedure, possible where each side is represented by counsel, to a more informal and inquisitorial procedure. The judge can no longer be a passive referee, but must intervene to ensure that legally relevant arguments are not lost.

The theory behind the legislation is that every member of the public is entitled to equal access to a Queen's Bench judge regardless of the amount in dispute. However, defining equal justice as a hearing before a judge regardless of the size of the claim creates practical difficulties that currently disadvantage the claimants themselves. An unrepresented plaintiff who appears without necessary documents or witnesses may find his or her case dismissed, leaving only an appeal to the Court of Appeal in Fredericton on a matter of law. Under the old procedure, a de novo hearing before a local Queen's Bench judge was possible after the initial hearing with the clerk, and it was common for clerks to adjourn hearings when plaintiffs arrived unprepared. The most feasible solution likely to emerge would see the law-trained clerk conduct a pretrial meeting to ensure that unrepresented litigants understand the proceedings. Thus the new approach would emerge as more time-consuming, since ensuring equal justice would in effect mean providing advice to civil litigants whose disputes are too small to justify the cost of private legal advice.

Responses to the new small claims procedure are diverse. One judge was concerned that now he talks too much when both parties are represented by counsel. Another judge expressed the view that his colleagues do a better job in other civil matters as a result of their work on small claims - perhaps precisely because they are less passive than before. One result seems clear: the judiciary has had the capacity to absorb its new caseload without increasing delay in other proceedings.

Another unanticipated result may occur. The new influx of civil cases that are lower in prestige may enhance the relative equality of Trial Division and Family Division work, reducing the status difference that now exists between civil and family law litigation. Relations between the two divisions would then be more symmetrical, increasing the feasibility of rotation and reducing the separation between Trial and Family Division work. To the extent that civil litigation is more desirable work than family litigation because civil matters are more legal and less personal, adjudicating small claims reduces that difference.

Evaluating Court Reorganization

Previous sections have already indicated the extent to which accessibility, efficiency and quality have all increased following merger in New Brunswick. Two small provincewide courts were not providing the same level of service that a merged court still manageable in size can provide today. Yet in a broader historical view, authoritative conclusions are more difficult.

For example, the geographical accessibility of the New Brunswick courts is not as great today as it was in decades past. The number of Provincial Court locations decreased during the 1980's, as did the number of sitting points for Queen's Bench and County Court in the 1960's. To conclude that developments in transportation and communication have maintained access even as court locations are closed will require the kind of socioeconomic analysis that is beyond the scope of this study. Despite measureable gains in service by the Court of Queen's Bench, having

Table 6-3

Total Number of Causes and Matters Filed in New Brunswick Court of Queen's Bench, Trial Division, by Location, 1986-89

Judicial District	Causes and Matters Filed*			% Change,
	1986-87	1987-88	1988-89	1986-89
Moncton	1,501	1,734	2,075	+ 38.2 %
Saint John	1,678	1,580	1,682	+ 0.2
Fredericton	759	834	860	+ 13.3
Bathurst	815	767	788	- 3.3
Campbellton	216	230	186	- 13.9
Edmundston	539	487	398	- 26.2
Newcastle	239	241	n/a	n/a
Woodstock	311	400	305	- 1.9
Total	6,058	6,273	6,294**	+ 3.9**

Source: Annual Reports of the New Brunswick Justice Department.

* Includes both civil and criminal cases. "Causes" make up 82% of the total caseload over a three-year period. "Matters" include but are not limited to criminal trials and summary conviction appeals.

** Missing from the total are the filings from Newcastle. If they remained the same as the previous year, the total would be 6,535, an overall provincial increase of 7.9%.

a superior court judge in one's home town may mean something quite different – and more limited – in 1991 than it did in 1961 or 1931, given changes in how legal disputes arise and how they are dealt with.

As another example, efficiency is commonly measured in terms of output per unit of work. Yet court filings fluctuate from year to year, and unless court personnel increase or decrease without any long-term change in workload, or remain stable despite escalating or decreasing workload, little can be said. Consider for example Tables 6-3 and 6-4, showing Trial Division and Family Division filings for a three-year and four-year period respectively. Trial Division work is relatively stable for the province as a whole, but has been declining in the smaller centres and increasing most visibly in Moncton. Total Family Division filings have increased, but show a decline in the most recent year for which data are available, so that overall percentage increases are similar in both divisions.

Table 6-4

Total Filing Activity in New Brunswick Court of Queen's Bench, Family Division, 1985-89

Year	Family Services Act Filings	Marital Property Act Filings	Total Filings
1985-86	2,602	457	7,136
1986-87	2,739	534	8,059
1987-88	2,905	579	8,202
1988-89	2,618	531	7,784
% Change, 1985-89	+ 0.6 %	+ 16.2 %	+ 8.3 %

Source: Annual Reports of the New Brunswick Justice Department.

Taken together, the tables suggest that the Court of Queen's Bench has been able to absorb increased filings with existing personnel. However, if the increases are small from year to year in percentage terms, they could disguise very real caseload pressure over time that would require increased personnel. At the same time, reduced filings in smaller centres might require reallocation of judges over the long term, with a resulting decline in geographical accessibility.

Moving to a Unified Criminal Court

Criminal court unification is back on the agenda in New Brunswick. When the provincial attorneys general endorsed the unified trial court concept in principle in June 1990, three attorneys general – from Ontario, British Columbia and New Brunswick – signalled an intention to move immediately. By September 1990, only New Brunswick's James Lockyear still held a justice portfolio.

Support in principle is not likely to produce a unified criminal court in other provinces, given the skepticism of the criminal bar and the lack of countervailing pressures for change. In New Brunswick, however, field work revealed conditions and opinions not found elsewhere in the country:

(1) Opposition from the criminal defence bar, typical in other provinces, is not found in New Brunswick. Only a handful of private counsel in the province handle predominantly criminal work. Two leading lawyers, interviewed because of their anticipated opposition or skepticism, were in fact receptive to unification. Both cited as a major advantage the availability of judges with more extensive criminal law experience who were now confined to hearing cases in Provincial Court. The lawyers also emphasized the need to maintain a strong and viable system of preliminary inquiries as an essential condition for supporting a unified criminal court.

(2) The Chief Justice of the Court of Queen's Bench is sympathetic to the concept, contrasting again with the skepticism of most of his colleagues in other provinces.

(3) These atypical views may be linked to the different distribution of criminal cases in New Brunswick. The smaller number and proportion of criminal cases that go to Queen's Bench in comparison with the criminal caseload of superior courts in other provinces, combined with the dispersion of Trial Division judges in eight judicial centres, produces two results that reinforce one another. Trial Division judges have less opportunity to develop and maintain skills and expertise in criminal law. And the high proportion of civil work requires that appointing authorities seek out judges with more background on the civil side. In short, subject matter specialization in the New Brunswick courts is higher than in other provinces, making the shift to a unified criminal court seem more sensible to that province's bench and bar.

At the same time, support for unification is far from unanimous. Queen's Bench judges raised the same practical and theoretical questions as their colleagues outside New Brunswick. One respondent expressed real concern that the Provincial Court bench had a law enforcement bias that would colour a unified court and undermine its impartiality.

Similar questions about the personal views of judges may be raised in any country. Regardless of their validity, these concerns must be taken seriously by judges as a reminder of the continuing need to consider each case on the merits in spite of an accumulated knowledge of hundreds or thousands that have come before. At an organizational level, these questions are a reminder of the need for an institutional separation of adjudication and law enforcement, along with proper appeal mechanisms and other checks to ensure that judges are impartial, and are seen to be impartial.

Sufficient support for the concept of a unified criminal court may exist in New Brunswick, but that does not ensure that the idea can be implemented effectively in practice. If New Brunswick follows the pattern it established with its unified family court, it would create a Criminal Division of the Court of Queen's Bench, and the Criminal Division judges would handle only criminal work, while the judges of other divisions would do none. Since the Criminal Division would presumably sit in more locations, as the Provincial Court does now, its judges would be more itinerant. Since New Brunswick, unlike other provinces, has no justices of the peace, Criminal Division judges would not only handle all Criminal Code matters, but also provincial highway traffic offences and bail hearings. Unless the Queen's Bench clerks were given the signing authority of justices of the peace, that responsibility would also belong to Criminal Division judges.

As a result of this pattern of work, Criminal Division judges would also have less prestige and status than their Trial Division counterparts. This would probably not bother the first generation of appointees, who would presumably have previously served on the Provincial Court. The increased criminal law jurisdiction and the substantial increase in salary would be rewarding enough. But as the first generation retires and new appointees come on the Court of Queen's Bench, the Criminal Division may also be considered a place to break in before moving to the Trial Division. Thus it is essential that thought be given to some sharing of responsibilities across divisions. If a unified trial court is worth creating in New Brunswick, it should be truly unified, a joint enterprise and not a balkanized one. Specialized knowledge and experience will surely be recognized, but hopefully not made the only criteria for distributing work.

If a unified criminal court is created in New Brunswick without justices of the peace, and small claims continue to be tried by Queen's Bench judges, New Brunswick will have a one-level trial court with no subordinate judicial officers hearing contested or even ex parte matters. If that occurs, the province will have a more fully unified trial court than any state in the United States, and perhaps any jurisdiction in the world.

Given the findings in Chapter Five regarding the pressures that have existed to delegate adjudicative work to subordinate judicial officers (for example, in the District of Columbia), similar pressures are likely to operate in New Brunswick. The salaries of section 96 judges are so much higher than those of law trained clerks of court, or other officials that might exercise justice of the peace functions, that some reallocation of judicial work seems likely in the long run. At the same time, the commitment of both the judiciary and provincial government to create and maintain a court in which disputes of all sizes are treated equally, in the sense that all of them go before a judge, may provide a counterweight to that tendency.

The Need for Flexibility in a Small Province

The philosophical concern that has driven recent New Brunswick court reforms is the idea that disputes should have the opportunity to be heard by a judge regardless of the stakes involved. At times that idea has overshadowed the practical administrative benefits that supporters have attributed to court unification.

Consider for example the issue of criminal court delay. New Brunswick has a well-earned reputation for the expeditious disposition of criminal cases in both Provincial Court and Court of Queen's Bench. Data reviewed by the Supreme Court of Canada in Regina v. Askov showed New Brunswick easily outperforming seven courts in Ontario and British Columbia in bringing criminal cases expeditiously to trial. But overall success in maintaining low elapsed times to trial does not mean that the province is without pockets of delay, small court centres that face difficulties catching up once they have fallen behind. Following the October 1990 judgment in Askov, New Brunswick justice officials were particularly concerned about delays at one northeast Provincial Court location in the Acadian Peninsula. Accused persons appearing there in December could not receive a trial date until the following August, well over twice as long as elsewhere in the province, so that a single adjournment could lead to a dismissal on Charter grounds. The number of charges filed there had not grown, but problems over the previous year had led to a backlog.

Temporary assistance from a Provincial Court judge from another community was the first obvious response, but was limited and difficult because of language differences. Trials on the Acadian Peninsula are normally conducted in French, and immediately available Provincial Court judges were English speaking. There were French-speaking judges on the Court of Queen's Bench who could have been available to assist on a temporary basis, but no statutory authority existed to assign them to Provincial Court cases, even with the agreement and authority of both the Chief Justice of the Court of Queen's Bench and Chief Judge of the Provincial Court, and the consent of the judge involved.

It is situations of this kind that have led advocates of a unified criminal court to argue that unification is the answer, because it provides the flexibility to deal with problems of this kind. The argument becomes particularly persuasive in a smaller province such as New Brunswick. It must be noted, however, that major structural change is not necessary to deal with a short-term problem of this nature. Some other provinces (including neighbouring Nova Scotia) have given section 96 judges the authority to sit in Provincial Court. While rarely used, the provision means that in smaller centres litigants need not leave the courthouse and return another day when a relatively short matter is not reached.

Conversely, supporters of a unified criminal court might still argue that the chief justices of section 96 trial courts have little incentive to cooperate with their Provincial Court counterparts in ameliorating short-term backlogs. Unification becomes important because it creates accountability for effective operation of all provincial trial courts, where none exists today. This is an important argument that can only be answered by the practical responses of section 96 chief justices in the various provinces. The emergence of provincial bodies in which both federally- and provincially-appointed chiefs meet to address common problems (as in Manitoba) may signal a renewed commitment to increase the flexibility of the current system of court organization.

How New Brunswick approaches the further unification of its trial courts could be of long-term importance in the history of Canadian courts. A unified criminal court in that province would be the most important change to emerge from the current round of court reform debates. At the same time, provinces not considering trial court unification need to remain aware of the variety of alternatives available to address issues of efficiency, access and fairness in their trial courts. Manitoba provides some particularly interesting current experience.

MANITOBA

Manitoba was the last of the three prairie provinces to merge its superior and county courts, but when it did so in 1984, the province also created a unified family court. By the end of 1990, Manitoba not only had a trial court structure as unified as that of New Brunswick, but was taking significant and innovative steps to unify the administrative operation of its trial courts, and to work with the judiciary in doing so. A review of Manitoba court reforms will therefore be valuable in three different ways. First, to be able to compare the merger of its section 96 courts to those in Alberta and New Brunswick. Second, to see whether its unified family court, operating in conditions much different from those in New Brunswick, has developed in the same way. And third, to document its recent administrative innovations.

Merger in Manitoba

Manitoba has the most centralized court system of the three provinces examined in this chapter, a reflection of the fact that its population is concentrated in a single metropolitan area, Winnipeg, to a degree unknown in any other province. Currently, 564,000 of Manitoba's 1,028,000 people live in Winnipeg. Brandon, the province's second largest city, has but 36,000. As a result, Manitoba's judiciary is concentrated in Winnipeg as well. At the same time, however, Manitoba's north is so large that its Provincial Court has more fly-in court centres than perhaps any jurisdiction in North America except the Northwest Territories.

In 1982, prior to merger, Manitoba's Court of Queen's Bench judges all resided "at or near" Winnipeg. [Manitoba Law Reform Commission (1982), I.C., p. 19] They held court in Winnipeg and four other centres. The County Court sat at 16 centres, each designated as a County Court district, but only three County Court judges resided outside the Winnipeg area – in Brandon, Dauphin and Portage la Prairie. Both courts were relatively small, closer in size to their counterparts in New Brunswick than those in Alberta. Queen's Bench had only recently been increased to 10 judges in 1981, and the County Court had only slightly more.

As in the other two provinces, County Court jurisdiction was historically rather limited. It was 1934 before the monetary limit was raised to $800., and 1958 before it rose to $2,000. Criminal cases were tried much more frequently in County Court than in Queen's Bench, but the County Court was limited to trials by judge alone, what Manitoba terms "speedy trials." Only a Queen's Bench justice could preside over a trial by jury.

Yet by the time the Manitoba Law Reform Commission recommended merger in a 1982 report, it could cite "the substantial overlap of jurisdiction ... that has come to exist," [p. 9] concluding that "the processes of time have already created in Manitoba what are in effect two courts of substantially similar or indeed competing jurisdictions." [p.7] In 1976, civil jurisdiction of the County Court was increased to $10,000., and even more important was made unlimited with consent of the parties. In 1979, the administrative operation of the two courts was amalgamated into a single office headed by an official who carried the combined title of Prothonotary of the Court of Queen's Bench and Clerk of the County Court. And in retrospect, interview respondents in 1990 conceded that the two benches were relatively equal in prestige and quality at the time of merger; one respondent argued that the lower-status County Court judges were superior to their higher-status counterparts on Queen's Bench. The Chief County Court Judge at the time of merger never sat on the Court of Queen's Bench, receiving instead an appointment to the Court of Appeal.

The momentum behind merger allowed it to occur with relatively little controversy. Because merger had occurred elsewhere in comparable jurisdictions, including both prairie provinces, the burden of proof had shifted in the Law Reform Commission's view from those who would change the existing system to those who would retain the old one. "[I]t is not intended at all," the commissioners wrote, "to suggest that the existing system is manifestly bad and in urgent need for reform." But given the overlapping jurisdiction and the changes elsewhere, it was necessary to "consider whether there continues to be justification for retaining a dual trial court system." [p. 9] Only then do the commissioners go on to argue that "strong positive reasons" exist for merger, including flexibility and efficiency, simplicity, equality before the law, and improvement of the administration of justice in rural districts. [pp. 10-11] Also important was the support of the organized bar, spearheaded by lawyers outside Winnipeg who felt that merger could produce "a new more comprehensive and flexible schedule or system of court sittings." [p. 12]

Following its recognition of demands for service outside Winnipeg, the Law Reform Commission recommended that resident judges be retained in Brandon, Dauphin and Portage la Prairie, and a resident judge be added in the north. Which of two northern centres should have a resident judge was "a very difficult question" that the Commission was unable to answer; [p. 22] the fact that the two communities are also remote from one another and reached most easily by plane through Winnipeg added to the difficulty. In all, sittings were recommended for 12 centres, less than the 16 served by the previous County Court, but more than the five then served by Queen's Bench.

The Unified Family Court Comes to Winnipeg

As merger of Queen's Bench and County Courts was building momentum for passage and implementation, a different set of proposals was being developed. Winnipeg lawyer Robert Carr approached Attorney General Roland Penner about the need for family law reform in the province. Penner, recently elected to the legislature for the first time, and named Attorney General in the New Democratic Party government shortly thereafter, had been a law professor at the University of Manitoba, but was unfamiliar with the growing literature on court structural reform. Penner asked Carr to prepare a report on the broad area of family law. Carr's May 1982 Report on the State of Family Law in Manitoba: Recommendations for Change ran 176 pages and made 78 recommendations. The first 76 focused on substance and procedure in family law matters. Recommendation 77 called for the creation of a unified family court in the Eastern Judicial District (i.e. Winnipeg) with "exclusive jurisdiction to deal with family matters," but not with "juvenile or criminal matters of any kind." [Carr, I.C., p. 175]

Carr built his "Jurisdiction of the Courts" chapter on the 1974 Report of the Law Reform Commission of Canada as well as a report of the Ontario Law Reform Commission. More important, he visited the pilot courts in Saskatoon and Hamilton, praising the values and many of the practices he observed in those courts, and citing the "almost evangelical" commitment of the judges. [p. 145] His report emphasized the need for specialized judges and strong support services (conciliators and social workers). Carr recommended that six judges be appointed in Winnipeg, including a combination of Provincial Court judges, section 96 judges and "members of the domestic bar." [p.175]

Carr's key recommendation went into effect in 1984, at the same time as the merger of Queen's Bench and County Court. A unified family court was established for Winnipeg and the Eastern Judicial District, which extends to the eastern and southern borders of Manitoba. Because the unified family court was created at the same time as the merger of Queen's Bench and County Courts, what emerged was a single section 96 court, the Court of Queen's Bench, with a General Division and a Family Division each headed by an Associate Chief Justice. Appointed to head the Family Division was Queen's Bench Justice Alvin C. Hamilton. Joining Hamilton in the Family Division were six new appointees, only one drawn from the Provincial Court; others were from the family law bar, including Robert Carr himself.

The New Queen's Bench Court in Operation

The General Division's operation strongly reflects its continuity with pre-merger court organization. Filings are still made in all 16 former County Court centres. [Hewak (1990), I.C., p. 15] Following the Law Reform Commission's 1982 recommendations, judges sit in 12 of those centres. As before merger, there is a resident General Division judge in the three centres outside Winnipeg that previously had resident County Court judges: Brandon, Dauphin and Portage la Prairie. As before merger, but contrary to Commission recommendation, no resident judge sits in Northern Manitoba.

The Family Division that began sitting in Winnipeg in 1984 had no earlier framework on which to build. Associate Chief Justice Hamilton worked energetically to develop a cooperative combination of judicial and support services, looking again to Hamilton, Ontario, and other pilot projects for the processes and procedures he would need to implement.

In many respects, Winnipeg's unified family court operated apart from the General Division. The emphasis on specialized judges isolated the two divisions; General Division judges did not sit in Family Division, and Family Division judges did not sit in General Division. It is likely that this isolation was reinforced both by General Division judges' lack of interest and experience in family law, and by the distinctive approach the Family Division developed for handling its work. It was Carr himself who argued for a distinct and essentially separate court. To this day, no Family Division judges sit on General Division matters in Winnipeg.

By 1987, planning was under way for extending Family Division jurisdiction beyond the Eastern Judicial District. A committee was set up, chaired by the Assistant Deputy Minister of Court Services, to report on "family law services outside of Winnipeg." The committee included four judges and a Brandon lawyer. After consultations in five western and northern judicial centres, the committee recommended expansion of the Family Division (either all at once or region by region), with its judges sitting in the same locations as the General Division, and appointment of a resident Family Division judge in Brandon. While the committee recommended that Family Division judges "be used to hear family matters... as much as possible," it also recommended that in centres without a resident Family Division judge, "there be concurrent jurisdiction" with the Provincial Court "with respect to family matters that are within the jurisdiction of the Provincial Court." The recommendation for concurrent jurisdiction reflected the concern of the bar in small communities that accessibility would be reduced if a resident or nearby Provincial Court judge was replaced by a fly-in Family Division judge.

The provincial government opted for full province wide expansion of the unified family court. On October 1, 1989, the Family Division was given exclusive jurisdiction throughout the province, along with three new judges, one of whom would reside in Brandon. However, if the Provincial Court retained no concurrent jurisdiction, some organizational changes would be necessary in Queen's Bench to ensure accessible service in judicial centres without a resident judge. If both General and Family Division judges retained completely separate schedules when they went on circuit, as they already did in Winnipeg, the advantages that a unified family court would bring in specialized knowledge and commitment could be outweighed by less frequent sittings and the additional cost of sending two judges to do a small amount of work that could legally be done by only one of them.

Thus in 1990 for the first time, combined sittings of Family Division and General Division were set up in Flin Flon, Swan River, and Morden. The idea was that if a judicial centre had a calendar primarily of civil matters, a General Division judge would sit there, and handle the civil business along with any pending family matters; conversely, a judicial centre with more family matters would be served by a Family Division judge who would also deal with pending civil and criminal matters. Given the history of separate divisional operations, even this small step required careful negotiation.

There is no sign that a mutual sharing of Family and General Division work on circuit will be extended either informally or formally to Brandon and Winnipeg. It should be noted that General Division judges are assigned regularly to the Family Division in Winnipeg. The assignments are usually four weeks in length. During 1990, they were scheduled so that one General Division judge was sitting in the Family Division throughout the court year. Interviews suggest that family division work is not the most sought-after assignment. And since Family Division judges are never assigned to the General Division in Winnipeg, even on an emergency fill-in basis, current practice could over time lead to the reemergence of the status differences between civil, criminal and family work. There is no indication that periodic rotation across divisions will undermine the commitment to specialized expertise in family matters; on the contrary, it might sustain that commitment for a longer period and reduce burn out.

In the regular assignments set out for Queen's Bench judges in both divisions, a master calendar approach is evident, closer to Alberta than to any of the three United States jurisdictions. Judges are assigned by week, and in some cases even by days in smaller centres. Judges in both divisions who are resident in Winnipeg can expect to be assigned four weeks a year to other centres. General Division judges in Winnipeg are assigned to a combination of civil and criminal work, although the distribution of civil and criminal weeks is not as finely balanced as in Alberta, perhaps owing to the exigencies of long criminal jury trials.

Evaluation

An accurate assessment of the effectiveness of current trial court organization in Manitoba would require more examination of the diverse needs of Winnipeg and other court centres. Because time did not permit field work in judicial centres outside Winnipeg, it was not possible for example to canvass the views of practitioners there comparing the accessibility of justice before and after the 1984 merger and unification of family law.

In a formal sense, the General Division has maintained the local presence of the old County Court. In practice, however, this means an average of less than one sitting day a month in Minnedosa, Flin Flon, Morden and Swan River. No sitting days are scheduled in any of these centres in July and August. Selkirk is served two days a month, one day from a General Division judge and another from a Family Division judge.

In family matters, it may be that opting for exclusive jurisdiction over family law in the Family Division of Queen's Bench, while bringing jurisdictional unity and gaining effective support services and expert judges, has meant that some family matters are not dealt with as swiftly as in the past at centres outside Winnipeg and Brandon. This question would require further research, since the ability of the Family Division to respond quickly through use of the telephone and fax machine may have overcome the physical distance that would otherwise limit the effective range of judicial authority. That the commitment to be responsive is still high was reflected at the time of my visit in November 1990, when one of the more recent Family Division appointees, assigned to his week as duty judge, was still in the Winnipeg courthouse during the dinner hour acting on a motion from a custodial parent, while the child and the other parent were at the airport for a flight later that evening.

Participants clearly believe that the gains in flexibility and efficiency promised by merger have been realized in Manitoba. Furthermore, the reports presented annually by Queen's Bench Chief Justice Benjamin Hewak and published in the Manitoba Bar Association's journal show a strong performance by the reorganized court. As of December 31, 1986, the Chief Justice reported that "the time delay for trial dates has reduced considerably," and indicated that "from the time the case is ready for trial" a civil trial can be obtained in three to four months, a criminal trial in two to three months and trial in a family matter in one to two months. [Hewak (1987), I.C., p.12] A year later, he reported a two to three month wait for both civil and criminal trials, but a six month period for trial dates in the family division. [Hewak (1988), I.C., p.3] The Chief Justice's report for the year ending December 31, 1989, showed a return to earlier figures – two to four months in civil and criminal trials (depending on length), and within six weeks in family matters. [Hewak (1990), I.C., p. 15]

Of course, it is impossible to conclude from these figures alone that merger has improved court operations. Reductions in delay may be the result of introduction of procedural reforms such as pretrial conferences that could also have been implemented in separate trial courts. Further research would also be necessary to measure the time that elapsed from the initial filing to the disposition of civil, criminal and family litigation, lest reductions in the length of time to obtain a trial date do not mask increases in the time taken to complete discoveries or reach a pretrial conference. However, these legitimate technical questions should not obscure the sense of the Queen's Bench judiciary that the last decade's reforms in trial court structure have been worthwhile and beneficial.

Can any summary statements be made about the effects of structural reform on the quality of justice? On the General Division side, merger maintained and perhaps improved the quality of justice. Because of the strength of both the County Court and Queen's Bench judges before 1984, there were no grounds to fear a decline in the quality of adjudication. To the extent that a combined bench (23 General Division judges in 1990, plus the Associate Chief Justice) allows a fuller pooling of skills and experience, it should provide a net gain. The prospect of a new judge with extensive criminal law background but little or no experience on the civil side arriving at the old Court of Queen's Bench to face a diet of almost exclusively civil work would no longer occur.

In the Family Division, by contrast, specialization of judges has been seen as an engine for improving the quality of adjudication in family matters, not only because of the expertise of the judges, but also because of their knowledge of how to integrate the expertise of conciliators and other support personnel into the court process. Prior to the creation of the unified family court in 1984, family litigation was in a sense a stepchild in all three Manitoba trial courts, never as high a priority as civil matters in Queen's Bench or criminal matters in the Provincial Court. The bringing together of family litigation into a single court committed to its effective resolution was a critical step in the evolution of the Canadian judicial process.

Whether the continued effectiveness and development of family law adjudication requires continuing the relative isolation of Family Division judges is a separate question. A distinct division of the court, and a corps of knowledgeable and committed judges, both remain important. But neither one requires a full-time regimen of family law cases, and both may in fact suffer in the long run without the kind of interaction across diverse areas of law that allows new ideas and approaches to come forward.

Small Claims: Anticipating Change

What Manitoba court has jurisdiction over small claims? Does Manitoba give small claims jurisdiction to its Provincial Court judges, as in Alberta, or unify civil jurisdiction in its superior court, as in New Brunswick? The answer is that Manitoba has always given small claims jurisdiction to a section 96 court. The County Court handled small claims before merger, and now those matters are part of Queen's Bench jurisdiction. Discussion did take place after merger about shifting small claims to Provincial Court, but the Chief Judge at the time was apparently not interested, believing that his court should maintain its primary focus on criminal law.

What is most important about small claims litigation, however, is that whichever section 96 court has handled these matters has for many years used subordinate judicial officers and not judges. Furthermore, these judicial officers have not been members of the bar and have usually had no formal legal training. Some are experienced full-time court officials whose many years as small claims adjudicators have helped them acquire the skills to serve the public well. For example, one francophone senior court administrator at the Winnipeg Law Courts continues to sit on small claims in St. Boniface.

Currently, however, the system faces new strains that must inevitably lead to changes in existing practices. The Chief Justice summarized the situation in his annual report early in 1990:

> *On September 1, 1989 the Court of Queen's Bench Small Claims Practices Act was amended to increase the monetary jurisdiction of the Small Claims Court. It can now deal with money claims up to $5,000.00. This change has resulted in an increase in the number of contested cases, appearances by counsel representing litigants and longer and more complex trials. The problem must now be confronted of how to preserve the character of Small Claims Court as a "people's court" and still deal with the increasingly complex legal issues that court will handle. [Hewak (1990), I.C., p.14]*

With a limit as high as $5,000., the use of hearing officers without legal training is likely to come to an end. If lawyers appear and observe errors of law by a hearing officer, the number of appeals to Queen's Bench judges are likely to increase. Apparently that is just what has happened. And the consequences of inadequate legal knowledge will become increasingly obvious to outsiders as well. One observer reported that a hearing officer dismissed a plaintiff's action because, while he sympathized with her situation, she had not proven her claim "beyond a reasonable doubt." Perhaps as disturbing as this fundamental error was the fact that only the defendant and not the plaintiff was represented by counsel, so the ruling went unchallenged.

"It may be," the Chief Justice himself concluded, "that the time has come for legally trained hearing officers to hear those cases involving complex legal issues." [Hewak (1990), I.C., p.14] Note however that the Chief's call for change only brings Manitoba to the point where New Brunswick was a decade ago, while New Brunswick has recently taken small claims away from legally trained hearing officers and shifted them to Queen's Bench judges. His comments suggest that Manitoba would consider that change inappropriate, on the grounds that it would undermine the openness, informality and expeditiousness of the small claims process.

The real policy dilemma that Manitoba and other provinces face is that the desire to maintain an informal and accessible process for small claims is currently competing with a desire to simplify and hence reduce the cost of civil litigation that falls outside the traditional monetary limits of small claims. Manitoba's $5,000. limit has been matched in other provinces; and British Columbia has raised, by devising an Economical Litigation Project for civil cases under $20,000.

As small claims limits increase, Manitoba and other provinces must deal with the reality that the "rough justice" of a summary court cannot be effectively reproduced when the value of a lawsuit becomes great enough that litigants demand a more deliberate and legalistic process, and are prepared to retain counsel to assure that those processes are followed. [See Merry, Getting Justice and Getting Even, II.A.] At that point, the task shifts back to a search for ways to simplify procedural rules, not set them aside.

The use of hearing officers for small claims is only one of the ways that Manitoba court practices diverge from those in New Brunswick. Remember that New Brunswick also has no justices of the peace, meaning that Provincial Court judges in that province have a variety of administrative tasks rare in Canada, and in sharp contrast with Manitoba's Provincial Court practice. Not only does Manitoba have JPs, but it is also the only province that still has magistrates. In other provinces, magistrates were abolished when they were transformed into Provincial Court judges. Manitoba created Provincial Court judges, but left the provincial cabinet with authority under Part V of the Provincial Court Act [R.S.M. 1987, c. C275] to appoint magistrates. The power has been used sparingly, but magistrates still operate in Winnipeg today, deciding matters that only a judge would decide elsewhere in Canada.

The shift to legally trained hearing officers was already under way in the Provincial Court during my November 1990 field visit. A Civil Service Commission Bulletin announced a competition for five "Hearing Officers (Criminal)" for Winnipeg at salaries from $30,525 to $50,876 annually. "[A] recognized law degree . . . plus several years experience within the justice system" were among the qualifications. Duties remained quite broad, going beyond bail applications and search warrants to include not only highway traffic, liquor control and by-law offences, but also "Criminal Code matters... as determined by the Chief Judge." These duties are consistent with section 43 of the Provincial Court Act, which provides that a magistrate "may act as and in the capacity of a judge of the Provincial Court for such purposes as the Chief Judge may determine." Whether this provision overcomes the absence of any statutory reference to tenure of office is problematic. Absence of reference to a fixed term of office or a removal mechanism in a provincial statute normally means that the official serves at pleasure. A hearing officer who exercises judicial power under the Criminal Code, even within limits determined by a Chief Judge, is still likely to be subject to section 11(d) of the Charter of Rights.

It is not the purpose of this section to discuss the merits of the constitutional issue; the Manitoba Law Reform Commission had a study on hearing officers under way issue last fall, and had already published an excellent survey of issues affecting the independence of provincially-appointed judges. [(1989), I.C.] The role of hearing officers is important because it illustrates just how far Manitoba has traditionally gone, and still plans to go, in giving judicial authority to non-judges. Manitoba is the only province in which summary conviction matters under the Criminal Code are adjudicated by hearing officers without the title of judge. And Manitoba has given more authority to hearing officers to adjudicate civil disputes than any other province. Perhaps, as judicial salaries increase, Manitoba's approach will be the wave of the future. At this point, its handling of low-dollar, low-penalty cases is closer to the use of Hearing Commissioners in the District of Columbia than to any practice elsewhere in Canada.

A New Organizational Structure for Court Administration

Realignment of trial court jurisdiction in Manitoba, a major accomplishment in the first half of the 1980's, was completed when the unified family court concept was extended province wide in 1989. Unification of the criminal courts is not currently on the provincial agenda. But major steps are under way to unify the administrative structure of the Manitoba courts, in a manner not yet achieved elsewhere in Canada.

The two key elements of these changes are:

- The judiciary is playing an active policy and senior management role. Judges hold three of the four positions on the Manitoba Courts Executive Board.

- Court services are being reorganized on a functional and regional basis, rather than by separate courts. When the process is complete, Provincial and Queen's Bench Courts will share the same administrative personnel.

These and other changes arose out of "an independent review of the operation of the courts system" conducted by the provincial Civil Service Commission in the fall of 1989 at the request of the Minister of Justice. The Chief Justices of Manitoba and the Court of Queen's Bench, and the Chief Judge of the Provincial Court, were consulted at the outset, and were involved both in the review and in subsequent implementation stages. The new structure combined a simplified hierarchy on the administrative side with an accountability system in which the three chiefs have a decision making role.

The focus of policy and accountability is the Executive Board, a body that includes the Deputy Minister of Justice (at the time the Board was set up, the Deputy was a former Provincial Court judge), the two

Chief Justices and the Chief Judge of the Provincial Court. Every court administrative policy change is presented in advance to this Board for their review, and has gone forward only after receiving their approval. The Executive Board served as an interview panel for selection of two new senior managers. By all reports, the four board members have worked well together, despite a series of difficult decisions they have had to make. The Board selected both senior managers from outside the courts, and has had to make controversial changes in the court reporting system (presumably not made easier in a province whose Attorney General is a former court reporter).

Accountable to the Deputy Minister and the Executive Board is the Assistant Deputy Minister for Courts. Before the fall of 1990, seven senior officials reported to him, including Directors of Court Services and Regional Courts; separate officials from the Court of Appeals, Queen's Bench and Provincial Courts; the Senior Master from Queen's Bench and the Senior Hearing Officer from Provincial Court. A new plan reorganized the administrators and realigned accountability. The two judicial officers (the Senior Master and Senior Hearing Officer) were made directly responsible to the Chief Justice and Chief Judge of their respective courts, recognizing their roles as independent adjudicators. The three separate court officials in Winnipeg were placed under an Executive Director of the Winnipeg Courts. The other two positions, Director of Regional Courts and Executive Director of Court Services, remain in place but with newly defined functions.

At the operating level in Winnipeg and in the five regional offices, the emphasis is on organizing and providing common services for the trial courts, as part of an effort to avoid duplication and improve flexibility on the administrative side, just as merger of section 96 courts was an effort to do so on the judicial side. This process is only beginning, although interviewees were already musing about a future time when members of the public could go to a single counter in the Winnipeg courthouse, regardless of the court in which their case was pending. Whether this is realistic, feasible, or appropriate, it would be done only after plans were considered and approved by the Executive Board.

It is important to remember that the effort to shift to a functional organization is not unique to Manitoba courts. Ontario is taking essentially the same direction. The province's Courts Administration Branch has been reorganized into eight regional offices, each headed by a Regional Director (RD), and a number of court service managers (CSMs) have been appointed to administer services for both levels of trial courts in particular cities and counties. Ontario's emphasis has been on what officials there term "integration" – combining for example the enforcement functions of the sheriff's office and Provincial Court, or the court reporting and recording functions previously divided between section 96 courts and Provincial Courts.

These operational changes have created stress and controversy in courthouses in both provinces, and it is still too early to assess whether and under what conditions this unified or integrated administrative structure is better than the system it is replacing. But it is clear that the Ontario and Manitoba initiatives already differ in a fundamental way. In Manitoba, the changes have the support of the judiciary, and were instituted only after consultation with and approval by the three judges on the Courts Executive Board. In Ontario, government has often talked with members of the judiciary, but has never given the judiciary the authority and responsibility that the Manitoba government has conferred on the Chief Justices and Chief Judge of that province. As a result, Ontario's changes continue to be the subject of contention and conflict; in Manitoba, very similar changes are proceeding with full judicial support.

It will be especially important for other provinces to observe the implementation of a unified court administrative system in Manitoba. If it achieves some of the efficiency and effectiveness goals posited by advocates of trial court unification and the unified criminal court, it could provide an alternative to those proposals for jurisdictional change – an alternative in which two trial courts would remain, while coordination of their work improves and sharing of their resources takes place.

The Changing Face of the Criminal Court

No systematic effort was made to canvass views in Manitoba on the unified criminal court. The issue is not currently on the government's agenda, and a wide variety of other reforms have captured the attention of the judiciary and the ministry. Some of the most important and successful have involved the Provincial Court.

After the so-called "Ticketgate" affair, the Provincial Court was in shambles. For a decade before the well publicized scandal, delays in the Provincial

Court were always barely within tolerable limits. Trial dates could usually be given within six months, but that time lapse was longer than in any Provincial Court west of Ontario. By the time a new Chief Judge was appointed in the wake of "Ticketgate," delays had escalated to the point where trial dates were routinely given 13 months ahead.

In the brief period since then, a remarkable turnaround has taken place. The Provincial Court in Winnipeg has instituted major changes in the way it processes cases, reducing the waiting time for a trial date from 13 months to four. Chief Judge Kris Stefanson has overseen the design and implementation of the new case processing system, and in so doing has introduced a new vocabulary into Canadian court administration.

The new system combines a "screening court" with "quarterly courts". Before a case is given a trial date, it goes to the screening court, which is essentially a framework for discussion between crown and defence counsel. By establishing a framework for an early meeting, the system encourages both counsel to examine their files so that informed discussion can lead to the entering of guilty pleas earlier than might otherwise occur. Only when a case is not resolved does it shift from the screening court to the quarterly court, where (following the system first developed a decade earlier at the College Park Provincial Court in downtown Toronto) a judge assigns trial dates within a 90-day period and then tries all the cases he or she has assigned for trial within that quarter. Earlier and more predictable trial dates were available once a higher proportion of cases were concluded in screening court.

This system does not run automatically. The Chief Judge must monitor its operation to ensure that cases are scheduled for trial within the 90-day periods, and that screening courts are operating promptly, effectively and fairly. If for example the crown proved reluctant to consider likely sentence outcomes at the screening court stage, the system would be unworkable. Even after the new process is in place and running, continual examination and improvement is necessary.

This delay reduction effort is not the only priority for the Provincial Court. For example, it has instituted a specialized family violence court to focus on prosecution and adjudication in this newly-recognized area of criminal behaviour. Initial evaluation of the court's work attests to its effectiveness. [Ursel, I.C.]

At the same time, the Chief Judge has established strong working relationships with the two Chief Justices who sit with him on the Courts Executive Board. While the atmosphere of mutual respect does not alter the differences in salary and status between section 96 judges and provincially-appointed judges, it does provide a basis for discussion and cooperation in light of the likelihood that two levels of trial courts will continue to exist in the province for some time to come.

Future Changes: Aboriginal Justice

Far more troubling and fundamental than the "Ticketgate" revelations were the events that led Manitoba to establish its Aboriginal Justice Inquiry under the joint leadership of Associate Chief Justice Hamilton and Provincial Court Judge Sinclair. The shooting of a prominent native leader by Winnipeg police led to a broad examination of the estrangement of the justice system from native people. At this writing, the draft report has been completed but not yet released, so it is impossible to say what new recommendations it will make for the courts. However, given the thoroughness of the commission's work, it is likely to generate a whole new agenda for increasing the effectiveness of court services, especially in less accessible locations in the province. This may mean a new emphasis on lay adjudicators on reserves, perhaps within the jurisdictional framework of existing provincial trial courts. Perhaps it will mean an expansion of the sitting points of the Court of Queen's Bench.

Whether trial court unification will facilitate the delivery of court services to aboriginal people is likely to remain a matter of debate even after the Hamilton-Sinclair recommendations are known. It is likely that an integrated approach to the work of the existing trial courts as they serve native communities will be important. If so, an imaginative response to the problems of aboriginal justice will be a critical test of the effectiveness of the cooperative relationships developed on the Manitoba Courts Executive Board.

Chapter Seven

Patterns of Structural Reform in Canadian Trial Courts

What can we say generally about changes in the structure of Canadian trial courts in light of the experiences in Alberta, New Brunswick and Manitoba? Generalizing from the three provinces examined in Chapter Six suggests:

- Merger of superior courts and county and district courts has been well received and successfully completed.
- Unification of family courts has achieved a number of the goals of family law reformers, but has accentuated specialization in ways not found in unified trial courts in the United States.
- Subordinate judicial officers have continued to play a role in merged or unified courts, and in some cases have expanded their numbers and activities. However, neither the continuation nor the growth of subordinate judicial officers is inevitable. Their existence reflects a policy choice made by governments.
- Unified criminal courts are unlikely to be proposed in most provinces, but may prove valuable in at least one province.
- The quality of justice in trial courts is linked in some instances to judges with specialized expertise, and in other instances to generalist judges. Structural reform must be combined with case assignment practices that recognize the need for increased breadth and depth before the most effective mix of court work will emerge.
- The gains cited by advocates of trial court unification – increased accessibility, efficiency and quality of justice – may be seen as courts grow in size and the number of trial court levels declines. However, these gains may be realized without structural reform and, conversely, structural reform may occur without realizing these gains.

THE SUCCESS OF MERGER

All three provinces examined in Chapter Six have successfully implemented the merger of their two section 96 trial courts. In each province, relatively small superior courts with judges resident in one, two or three centres absorbed the judges and jurisdiction of previously-existing district and county courts. District and county court judges resided in a small number of additional locations in each province; the total number of district and county judges in each province was barely more than the number of superior court judges.

In retrospect, those interviewed in all three provinces have difficulty recalling why there was any fuss about merger at the time. The existence of a single section 96 trial court is now a fact of life, a seemingly inevitable product of the social and economic changes of the twentieth century that rendered the local judges of the early decades less necessary today, and the more centralized superior courts of the early decades less justifiable as well.

In one sense, this conclusion is valid. In another respect, it obscures the many legislative and judicial steps that preceded merger and ensured its success. Alberta's District Courts and New Brunswick's County Courts were much more dispersed in the first half of the twentieth century. By the time merger was proposed, county and district court judges sat in fewer centres and travelled to fewer other centres than in the past. All three provinces had enlarged the civil jurisdiction of the county and district courts to the point where most matters that could be brought to the superior court could also be heard by county and district judges. All three provinces had established an office of chief judge that brought the various local judges together with a single voice. Conscious efforts were also made in all three provinces to appoint county and district judges who were as capable as their counterparts on the superior court. In turn, each of these four steps reinforced the others.

It appears that a similar pattern of change has occurred in the other five provinces that have implemented merger, as well as in Nova Scotia, where merger plans are now under way. However, the most recent mergers – in Ontario and British Columbia – built at least as much on the momentum of past changes in other provinces as they did on political support from within the province. Thus it will be particularly important to examine how merger works in those two provinces, to see whether the smooth implementation reported in Alberta, New Brunswick and Manitoba is experienced there as well.

For example, Ontario's two section 96 courts were much larger at the time of merger than those of the three provinces studied in Chapter Six, and the gap between the District Court, with resident judges in 48 centres, and the Supreme Court, with statutory authority for resident judges in only one centre, much greater. On the other hand, jurisdictional overlap of the two Ontario courts was as great as in Alberta and New Brunswick (and greater than in Manitoba), and the overall quality of Ontario District Court appointees was also high. Therefore one would expect that merger would work out effectively in Ontario over time, but would face greater initial administrative difficulties than in any other province.

We have thusfar argued that the success of merger is less a result of the inevitability of this change in court structure, and more a product of incremental legislative and judicial changes that increased the similarities between the two courts. One way of examining this argument would be to compare Canadian experience not with the United States but with Australia.

Trial court structure in Australia today closely resembles the structure of Canadian trial courts before merger. All five mainland Australian states (New South Wales, Queensland, South Australia, Victoria and Western Australia) have three levels of trial courts. Each one has a Supreme Court, a District Court (County Court in Victoria), and a set of Magistrate's Courts (Local Courts in New South Wales, Courts of Summary Jurisdiction in South Australia, and Courts of Petty Sessions in Western Australia).

Merger of the Supreme and District Court was implemented in 1921 in Queensland, but no other state followed suit. In 1958, Queensland reestablished its District Court rather than continue enlarging its Supreme Court as case pressure increased. None of the other four states has contemplated merger, even though a number of jurisdictional shifts have moved an increasing array of civil and criminal matters to District and Magistrate's Courts. The Supreme and County Courts appear most similar in the State of Victoria, where judges in both courts reside entirely in Melbourne, in court buildings across the street from one another; yet merger is never discussed.

One characteristic that separates the two trial courts is that Supreme Courts continue to handle appeals by rotating trial judges onto appeal panels. The appellate jurisdiction of District and County Courts is limited to summary conviction appeal hearings by a single judge. The error correction and law development functions of the highest state appeal court are exercised by the Supreme Court in every state but New South Wales, where a separate Court of Appeal hears civil appeals (while criminal appeals continue to be heard by rotating panels of Supreme Court judges). These appeal functions – entirely separated from the superior trial courts in all ten Canadian provinces – may be a factor that maintains the distinction between superior and intermediate trial courts in Australian states.

Whatever the reason, Australian state courts have not attempted or even contemplated merger despite its success in Canada, and despite similar economic and social changes that have reduced the differences between cases heard in the two trial courts. Thus merger is far from inevitable (and, in the case of Queensland, far from permanent). It is the product of the successful initiatives of intermediate trial court judges to upgrade their work and eventually press for their own abolition.

Still unknown are the long-term effects of merger on the future organization and operation of Canadian trial courts. The last section of Chapter Five linked the growing size and dispersion of superior courts to the separation of trial and appeal functions, both more characteristic of American court systems than their English and Australian counterparts. One implication of that analysis is the increased possibility of intermediate courts of appeal emerging in Canadian provinces, especially if trial court unification moves ahead in larger provinces whose final courts of appeal have already grown to double figures. Another implication is that superior courts will over time come more to resemble other trial courts, providing the conditions for eventual unification. Yet another possibility is the emergence of newly-differentiated adjudicative bodies, providing structural diversity to counterbalance the growing unity of the courts. This "possibility" is very real when one contemplates the growth of administrative tribunals over the past half century in areas formerly handled by the courts, including labour relations and landlord-tenant disputes.

These conclusions remain speculation, but are intended to remind readers that the seemingly inevitable and relatively painless trial court mergers of the past twenty years are more fundamental than they appear on the surface. The very success of merger invites reflection on how court structure can change – and how it will change again in the future.

THE UNIFICATION OF FAMILY COURTS

New Brunswick and Manitoba have the largest and most fully developed unified family courts in Canada. The two provinces have brought the once-separated elements of family disputes within a single superior court, and used specialist judges to handle those disputes. As a result, one of the fundamental goals of family law reform has been achieved in those two provinces. Interview findings in the two provinces reinforce the reformers' arguments that the court's clientele have benefitted from unification.

Yet unified family courts have not proliferated in Canada in the past decade as mergers have. Pilot unified family courts in Saskatoon, Hamilton and St. John's, Newfoundland, date back to the late 1970's. They have been continued on a permanent basis, but have never been extended. Even in Ontario, where family court unification had broader support than merger by 1989, the widely-accepted Hamilton model has never been duplicated. Reform proposals in Quebec, British Columbia and Nova Scotia have either stopped short of recommending immediate unification of family courts or taken alternative approaches to family law matters. Alberta, where some of the first family law research and reform proposals were made, shows no inclination to unify. Why?

If family court unification is compared with merger, the most obvious difference is that a convergence of the work of family court judges and other superior court judges has not occurred. Superior and county/district judges were increasingly seen to be handling similar kinds of cases, and were merged into a common pool. In contrast, family matters in New Brunswick and Manitoba remain differentiated from other superior court business – both in the perception of the judges and in the reality of case assignments. Now that uncontested divorces are handled in chambers to an extent unknown even a decade ago, superior court judges in jurisdictions without unified family courts spend even less time doing family work. The excitement surrounding the reform of marital property law beginning in the mid-1970's has given way to the emotionally-charged but normal routine of custody, access and support disputes that is the grist of family court work.

Under these conditions, unification of family courts has been less successful in reaching its advocates' goal of achieving for family litigation a status equal to civil litigation. Pointing out the critical need to resolve family disputes – perhaps a greater social need than the resolution of routine criminal or civil cases – has not been sufficient to spur provincial governments to enact structural reforms. Nor has it been sufficient to ensure the equality of civil and family work when both are done within the same court, as evidenced by findings in New Brunswick and Manitoba that family division work has less prestige than the work of the other Queen's Bench division.

The very specialization and commitment of family court judges, which family law reformers saw as critical to the success of unified family courts, has become a rationale for continued separation of family judges from other superior court judges, even though that separation has reduced the overall unity of the merged superior courts and had a negative effect on the morale of specialist family judges. These effects are especially visible in the second generation of unified family court judges – those who were appointed some years after the initial unification took place. It is these appointees who appear most distressed about the gap between their legal status as superior court judges and the reality of hearing only one class of superior court matters. These feelings were so strong in the Hamilton, Ontario, unified family court at the time that Justice Thomas Zuber was preparing his Report of the Ontario Courts Inquiry that the province's district court judges recommended against the expansion of the Hamilton model. The Ontario unified family court judges have subsequently had the opportunity to sit from time to time in District Court, but the same concerns remain today.

Australian experience is instructive here as well. The Family Court of Australia was created in 1975 by the Whitlam Labour government as a unified family court. While commonwealth legislation encouraged each state to set up its own unified family court, only Western Australia did so. Elsewhere, family law was brought within the newly-created nationwide Family Court of Australia. As a specialized federal court, it was separated from the state superior and district courts, cutting off an avenue for rotation and a source of more diversified work.

Despite these differences between the unified family court in Australia and its counterparts in Canadian provinces, the demand for more varied work has also arisen in Australia. The September 1990 Report of the Working Party on the Review of the Family Court notes that "the Court's jurisdiction has steadily been increased" to the point where it can (resources permitting) "accept transferred matters from the Federal Court," including judicial review proceedings, Trade Practices Act matters and income tax appeals. While "[t]he bulk of the Court's work still arises under the Family Law Act," jurisdiction over "matters transferred from the Federal Court was part of a 'renovation' of the Court by the Government." [Family Court of Australia, IV., p. 232]

As an additional initiative to diversify the work of Family Court judges, a number of the 44 appointees have received wider jurisdiction. Ten judges "hold appointments as presidential members of the Administrative Appeals Tribunal," and "spend 8 weeks each year on AAT matters."

In addition, the Chief Justice holds a commission as a Federal Court judge and holds an appointment as the Judge Advocate General of the Australian Defence Force, while the Judge Administrator, Eastern Region, holds an appointment as Deputy Judge Advocate General. A further judge holds a commission as a Federal Court judge and an appointment to a Federal tribunal. [Family Court of Australia, IV, pp. 232-33]

The new Chief Justice exemplifies the second generation of Family Court appointments. A former member of the Supreme Court of Victoria with an interest in administrative reform and computerization, he was not a family law specialist. Soon after that appointment, the Chief was joined on the Family Court by the former head of the Administrative Appeals Tribunal in Victoria, again a person with a background outside family law. Under these circumstances, it is not surprising to see steps taken to diversify the work of the family court bench, even within the limits possible in a federal tribunal.

In summary, unified family courts have been successful in bringing family matters into a single tribunal, but have been expanded only in Manitoba since the 1970's. This limited expansion seems to be related to a desire, visible in Australia as well, to avoid rigid specialization among superior court judges. This desire is not only understandable, but may also be beneficial. While expertise in family law remains valuable, there is no evidence that working exclusively on family matters is good for the judges involved or for the courts' clientele. On the contrary, American experience, where unification is not implemented by separate subject area, suggests just the opposite – that rotation of judges to ensure breadth and depth of court work is preferable to rigid, long term specialized assignments.

This being said, it remains unfortunate that unification of family law matters in a single court, a step with demonstrated benefits and widespread support, has been stalled for so long. It ought to be possible to implement unification of family law matters consistent with the need to avoid overspecialization, especially in those provinces already committed to court reform. This is most obvious in Ontario, where the provincial government continues to discuss implementation of a unified criminal court despite lack of support for and experience with the concept, while it has refused to go forward either incrementally or comprehensively with the unification of family law matters despite broad support from the bar and a successful pilot project in one of the province's largest jurisdictions.

THE ROLE OF SUBORDINATE JUDICIAL OFFICERS

Students of court structure often sound cynical when they point to examples of how often one-level trial courts include a second level of judges or judicial officers to do the scut work in the system. Illinois is a classic case in the United States, and South Dakota is also illustrative. Canada also provides examples. Manitoba is the most compelling case among our three Canadian provinces, and Alberta has expanded its use of masters following amalgamation of Supreme and District Courts.

Equally interesting, however, is the finding that Minnesota and New Brunswick are moving in the opposite direction, not simply in unifying all or part of their trial court structure, but also in shifting low-dollar and/or low-penalty litigation away from subordinate judicial officers. New Brunswick has moved small claims from law-trained clerks to Queen's Bench judges. Minnesota has eliminated lower court judges, and has restricted the growth of subordinate judicial officers in Minneapolis and St. Paul. These two jurisdictions may simply be bucking a trend that will catch them in the long term, but they are also reflecting a different perspective on adjudication. Regardless of whether "a judge is a judge is a judge," in New Brunswick and Minnesota "a case is a case is a case."

The contrasting approaches to the use of subordinate judicial officers are most apparent in family law. Unified family courts in New Brunswick and Manitoba do not use subordinate judicial officers. Manitoba is particularly interesting, because masters and hearing officers are common in civil proceedings in the Court of Queen's Bench, but are still not used in family law. The three unified family court pilot projects in other provinces also avoid the use of subordinate judicial officers.

The experience with family law in American unified trial courts is mixed. In South Dakota, family matters are exclusively handled by circuit judges: magistrates handle low-penalty criminal cases, preliminary stages in criminal proceedings, and small claims, but not family law. In Illinois, associate judges often do family work, but even in Cook County the Family Division includes a combination of circuit and associate judges. Ironically, it is Minnesota where family law is the responsibility of a judicial officer in one county (Duluth's St. Louis County), and referees in the state's two most populous districts (Minneapolis and St. Paul), although district judges handle family matters throughout the rest of the state. Overall, it appears that subordinate judicial officers have persisted in family law cases in highly unified American trial courts more than they have in Canada's unified family courts.

Australia provides the clearest example of the persistence – and growth – of subordinate judicial officers in family matters. The Family Court of Australia currently has seven "Judicial Registrars," who do the work of masters but retain the more gender-neutral title. The 1990 Working Party Report recommends four additional judicial registrars (and only two more judges). The judicial registrars do uncontested divorces and are delegated a wide variety of enumerated powers under the Family Law Act, including division of property issues up to $250,000. The dominant approach in the Australian Family Court today is to pass power down as low as possible, partly for financial reasons (Family Court judges earn A$140,000. a year, compared with A$105,000 for judicial registrars). As a result, the highly unified Family Court of Australia is also more stratified than any unified family court in Canada. Yet, in contrast with Canadian arguments, the Working Party concluded that the presence of additional subordinate judicial officers would improve administration, by permitting "greater flexibility in the use of judicial resources." [Family Court of Australia, IV., p. 242]

The concept of a unified one-level trial court was not even considered by the Australian Working Party. The notion that a unified family court should have only one class of judicial officer had already been rejected and was no longer a live issue, even as it remains an important part of Canadian debate on court structure. The notion that judicial hierarchy reflects only a concept of formal legal supervision, and carries no status difference, is recognized in Canada as an unrealistic view of the court world. Status differences between civil and family judges have even persisted when they sit on divisions of the same court, where their salaries are the same and their decisions are appealable to the same outside court.

Status differences are surely as noticeable in Australia, but they have not been a consideration when court structures are designed. Names have been changed to avoid diminishing the public regard for a court; thus New South Wales' Petty Sessions Courts were given the neutral label of Local Courts. However, no proposal to merge courts has come forward out of concern for equalizing the importance of classes of litigation by equalizing the status of the judges involved.

This theme is likely to continue playing an important part in the rhetoric of court reform in Canada. However, it would be a mistake for policy makers to conclude that promoting the importance of all classes of litigation means that judges alone must perform a whole range of functions that involve less discretion or are more ministerial in nature. Judicial officers other than judges can and should play important roles. A subordinate judicial officer in New Brunswick could sign certain documents (e.g. bench warrants ordered by a criminal court judge) without undermining the principle that litigants are entitled to put their disputes before a judge. Newfoundland Provincial Court judges could be relieved of a myriad of ministerial and quasi-judicial functions unknown to their colleagues in other provinces without undermining the principle. And subordinate judicial officers can exercise discretion in the scheduling and screening of civil and family matters, as they currently do throughout Canada, within the parameters of court rules and judicial directions.

Some attorneys general who supported trial court unification in June 1990 may urge that the principle that litigants are entitled to be heard by a judge be applied to small civil claims and provincial highway traffic offences, as in New Brunswick, while others may stop well short, as did Ontario's attorney general at the time, Ian Scott. So it is clear that the line between a judge's work and the work of subordinate judicial officers can be drawn in a way that leaves many tasks to non-judges. Where the line is drawn may say more about past practices in a particular jurisdiction than about current policy preferences and dominant ideologies.

What may be most important is whether the province recognizes the importance of its subordinate judicial officers – and uses their knowledge and experience, compensates them adequately, recruits them widely and openly instead of through patronage networks, and provides opportunities for their career development and mobility.

THE PROSPECTS FOR UNIFIED CRIMINAL COURTS

While the provincial attorneys general are on record unanimously supporting the principle of a unified criminal court as part of a one-level trial court structure, there is no indication that criminal court unification is under consideration in Alberta and Manitoba. It has had the active encouragement of the attorney general of New Brunswick, and widespread acceptance if not active support elsewhere in that province. There is no sign that either the long term commitment of Canadian Association of Provincial Court Judges or the more recent conversion of the Law Reform Commission of Canada and the provincial attorneys general will accelerate the pace of reform.

Some of the issues surrounding the unified criminal court will be discussed at greater length in Chapter Eight. Regardless of the merits or the shortcomings of unified criminal court proposals, it is clear that innovation is particularly slow and difficult in the field of criminal law. No action has been taken on recommendations of the Canadian Sentencing Commission, in spite of the strong case made in the commission's report. Our Criminal Code is celebrating its centennial, with no action in sight on the comprehensive and detailed changes recommended by the Law Reform Commission of Canada to overhaul the 100-year-old document. The Supreme Court's controversial Askov judgment came after the federal government chose not to reintroduce legislation brought to parliament in 1984 to define time limits in criminal cases (even in Australia, without a Charter, time limit legislation has been passed).

It may be that inaction in this field reflects the fact that criminal law is within federal jurisdiction. While provincial legislatures are not necessarily more responsive to the need for change in the administration of criminal justice, at least one or two provinces are likely to act more promptly than the federal parliament. It is more likely that criminal law issues receive less attention when economic issues take priority, when comprehensive criminal law reform becomes highly complex, and when the moral dimension of criminal law compounds the controversy and emotion surrounding legislative change.

It should be apparent to lawmakers that criminal justice reforms require greater priority. Hopefully, more evidence can be made available to lawmakers in the various provinces to indicate whether or not – and under what conditions – those reforms should include a unified criminal court.

THE TENSION BETWEEN SPECIALIST AND GENERALIST JUDGES

One of the major unresolved issues in Canadian debate on trial court organization focuses on whether it is better for judges to specialize in major areas of law – currently civil, criminal and family – or to work as generalists handling all areas of law.

Proponents of trial court unification are often identified as proponents of specialization, because it has been assumed that a one-level trial court is likely to be divided along subject matter lines. Yet one of the strongest arguments for larger and more highly unified courts is the difficulties that face judges in smaller less unified courts with less diverse jurisdiction. The two anecdotes that stand out from over 150 interviews and discussions with judges, lawyers and court officials in the current study both illustrate those difficulties. In one case, an experienced criminal lawyer was appointed to a small superior court that heard few criminal cases. He soon faced a backlog of civil cases in which he had reserved judgment. Feeling the stress, he sought reappointment to a court with a higher proportion of criminal matters. Rebuffed, he resigned, and died within six months. In another case, a new superior court judge without criminal law experience presided at a sexual assault trial. The jury convicted, but the Court of Appeal overturned the conviction as a result of an error in the judge's charge to the jury. On retrial, a second jury acquitted. The victim, after testifying at both trials, took her own life.

The reformers' response would be that this grim anecdotal evidence reinforces the arguments for unification, since a unified trial court would have room for judges with a full range of specialities. They have also argued that specialists should be appointed to a unified court, or would emerge from within it, to ensure that expertise is high and the quality of justice is maintained. Rotation across nonstatutory divisions could occur over time, at the discretion of the court, but would not be built into weekly or monthly assignments. Specialization is part of the reality of contemporary law practice, reformers would argue, and a larger organization could better adapt to that reality, while allowing for individual development and change over time.

Opponents of unification would argue that smaller courts divided not by subject matter but by traditional distinctions between major litigation and higher volume routine litigation would allow the superior court judges to be generalists, partly because lower volume would permit it, and partly because the challenging nature of the work would ensure that the best legal minds would accept appointment. Those individuals, regardless of their specialty in practice (or even their litigation experience), would be effective as generalists, enabling the judiciary to help sustain the fundamental coherence of the legal order. A one-level trial court, opponents would argue, would jeopardize the survival of a generalist bench. Advocates of this line of reasoning should therefore recommend adjustments to the jurisdiction of superior courts where a balanced workload is not currently possible (although they are unlikely to advocate that one-third of the workload be in family law), and may accept or even favour specialized judges in the higher-volume courts.

Impressionistic evidence from the current study suggests that the judges who are most satisfied with their work are in courts that do not organize on a specialized basis. Courts in which judges are assigned a variety of work seem to operate most effectively, regardless of whether those courts have a narrower band of superior court jurisdiction, as in Alberta's Court of Queen's Bench, or handle the entire spectrum of adjudication, as in Minnesota's District Court.

This initial conclusion may be explained or reinforced in two ways. First, management studies in other fields have shown that work with greater depth and breadth not only increases job satisfaction, but also improves performance. Overspecialization can hinder professional development by narrowing one's focus and turning one's attention away from the work's larger context. Secondly, higher judicial morale may come as much from a sense of fairness about the case assignment system as from the variety of assigned work. Thus a court that appears to operate as a generalist court might show signs of low morale or even bitterness if major cases or other highly prized assignments were thought to go more frequently to a small number of favoured individuals – or even to be assigned with too much emphasis on seniority.

Other findings suggest that there are limits on how randomized case assignments can be without jeopardizing the quality of justice. Thus the most telling criticism of Minnesota's one-level trial court came from Minneapolis respondents who felt that complex civil litigation was too often handled inadequately. This may indicate why a master calendar system (where an assignment judge retains the discretion to assign cases) still prevails in the largest American commercial centres (such as New York, Chicago and Los Angeles) even though individual calendar systems, often with random assignment, are frequently prescribed by American court management consultants.

These findings and speculations all reinforce the notion that case assignment practices are a critical component of an effectively organized trial court, regardless of whether that trial court is unified or not. This conclusion has important implications for both the proponents and opponents of trial court unification. A unified trial court that emphasizes specialization through case assignment practices that limit rotation and discourage breadth will decrease the quality of justice. Judicial expertise must be used in a way that is seen to be fair and that allows for growth and development. Simply unifying a trial court without addressing case assignment practices will undermine the goals of unification supporters.

Conversely, generalist judges can function effectively in a one-level trial court, as the Minnesota experience shows. Generalist judging need not be confined to a superior court, but can persist even in the most unified jurisdiction. If so, opponents of unification who favour the existing system because it ensures that superior courts are made up of generalist judges capable of dispensing justice that is high in quality will have to address issues surrounding the quality of justice outside the superior courts. Should existing Provincial Courts develop less specialized case assignment practices, and expand their jurisdiction to ensure adequate breadth and depth of court work?

How can recruitment and assignment of Provincial Court judges be developed to increase the likelihood of their subsequent appointment to a superior court? To what extent can statutory changes and appropriate court rules allow the assignment of a Provincial Court judge to superior court matters – and vice versa? Use of these assignments could increase the breadth of work, promote a sense of fairness and improve morale, as well as create more administrative flexibility. Similar reasoning underlies existing proposals and practices through which trial judges would be assigned from time to time to appellate panels, and appellate judges would sit from time to time on trials.

These steps all illustrate ways that the present system of trial courts could be modified to deal with the concerns of those who support complete unification. It would be a shame if polarization of views on a unified criminal court were to hinder more modest changes that might enhance the quality of justice.

One example of a beneficial initiative consistent with the principles developed here is the proposal made over a decade ago by Jules Deschenes, then Chief Justice of the Quebec Superior Court, that section 96 judges be authorized to sit on criminal cases outside the province of their appointment. Given that criminal law and procedure are federal, Deschenes' proposal is a workable way to promote the kind of interprovincial interaction consistent with both the purpose of a nationwide system of criminal justice, and the benefits of an open and growing judiciary. The Canadian Judicial Council, generally cautious in endorsing new policies, has given its official support to the proposal. Yet provincial attorneys general have opposed the idea, and necessary federal legislation has not been introduced.

ADMINISTRATIVE CHANGES WITHOUT UNIFIED TRIAL COURTS: POSSIBILITIES FOR CONVERGENCE?

The previous section referred to a variety of changes in the administration of the courts that could achieve some of the goals of unification advocates without changing court structure. The clearest example of such a change observed during field work was the administrative reorganization in Manitoba. Court services are being unified in Manitoba without changing the division of jurisdiction between Queen's Bench and Provincial Court. Manitoba court officials hope that organizing regionally and functionally rather than by level of court will make administrative services more readily accessible and efficient in both trial courts.

Manitoba developments contrast most sharply with trial court administration in Illinois. Jurisdictional unification of Illinois trial courts is 27 years old, but the administrative apparatus still consists of over 100 locally elected clerks of court and their offices. The dedicated clerks in a number of counties who take their court responsibilities seriously can only be frustrated by the rampant patronage in too many of these offices. Even a cadre of professional court administrators at the state level and in the larger circuits can make marginal gains at best in this environment.

In short, formal unification of court jurisdiction is neither a necessary nor a sufficient condition for making administrative changes consistent with the stated goals of unification advocates.

At the same time, field work strongly suggests that even without jurisdictional unification, a number of changes in the work of superior courts over the next 10-20 years are likely to alter further the working conditions that have distinguished the superior courts from the Provincial Courts. The Provincial Courts have always been more dispersed than the superior courts – meeting in more locations, operating in greater isolation. Superior courts have been more centralized, with judges resident in the largest cities, hearing from counsel in the largest law firms.

Increasingly, courts are hearing demands for more responsiveness, not only in the substance of their decisions but in the delivery of their services. Government services of all kinds are facing similar pressures. The most visible current demands revolve around justice for native people, and a series of inquiries have recommended making the justice system more responsive to needs of aboriginal people. This was a focus of the Donald Marshall, Jr., Inquiry in Nova Scotia, and the report of Justice Allan Cawsey in Alberta, and should certainly be a central concern in the long-awaited Report of the Aboriginal Justice Inquiry in Manitoba.

While recommendations may focus on the delivery of Provincial Court services in criminal cases, and the possible use of native justices of the peace, the availability of superior court services is also certain to be an issue. Superior court judges will likely be urged to travel more frequently to remote locations and hold court in facilities traditionally deemed inappropriate.

The delivery of justice in less populated areas may soon emerge as an issue for unified family courts. Geographical access has not been an issue for unified family courts over the past 15 years. The pilot projects were all in cities, the province-wide unified family court in New Brunswick has resident judges in eight court centres, and Manitoba's unified family court was limited to Winnipeg and the Eastern Judicial District until the past two years. Now that Manitoba has extended its unified family court to the western and northern areas of the province, it will be serving some centres on a circuit basis that were served in the past by resident Provincial Court judges with jurisdiction over some even if not all family matters. Already, Manitoba's Court of Queen's Bench has had to be more flexible in its circuit assignments to ensure that family matters are covered.

Access to courts in family matters was an issue raised in a brief to the Ontario Courts Inquiry of Mr. Justice Zuber in 1986. The supervisor of a women's shelter on Manitoulin Island with a clientele of native women

> *...described how the courts sit so infrequently there that the tendency to adjourn cases (e.g. when the husband fails to appear) results in abused women being unable to stay in a short-term shelter and being forced to return home without a custody order or even an interim non-barrassment order:*
>
> Legal Aid will not pay for [a woman] to have a lawyer unless her husband indicates that he is contesting the application. A husband who simply doesn't respond seems to have all the cards in his hand. [Baar , I.E., p.120, quoting Mary Nelder, Supervisor, Haven House, Mindemoya, Ont.]

If these problems arose in dealing with Ontario's Provincial Court in a rural location easily accessible by road, what problems might face a superior court in remote locations accessible only by air? The expansion of unified family courts to other provinces, limited as it has been, is still likely in the decade to come, and the commitment to providing access may find superior court judges in places they have never been before, working under conditions and at times of the day and the year when they have rarely done so in the past.

It is difficult to predict what other issues could arise in the next few years around accessibility and responsiveness of the courts that could have an impact on superior as well as Provincial Courts. The growth of large metropolitan centres such as Toronto, Montreal and Vancouver, along with attendant transportation problems, could lead to demands that the large merged superior courts in those centres shift judges to suburban locations such as North York, Longeuil or North Vancouver. Staggered hours that bring litigants and lawyers to court in the evening or the early morning would also alter work patterns.

Taken together, as noted above, these changes would make the superior courts more accessible and more like the current Provincial Courts – even without a unified criminal court or overall unification of the trial courts. Diversity and flexibility in case assignment practices will be essential, reinforcing the role of the generalist judge. But the more insular life style of the superior court judge earlier in the twentieth century is unlikely to survive intact by the twenty-first.

Chapter Eight

Evaluating the Unified Criminal Court

The focus of the present report has been to obtain a factual basis to evaluate past and current proposals for structural reform of Canadian trial courts. Since current reform proposals focus on the unification of trial courts – shifting from two or three or more court levels to a single trial court – chapters 3-5 canvassed experience with unified (or consolidated) trial courts in the United States. Three states were examined first-hand, and the general context and limitations of unification in the United States were also spelled out. Chapters 6 and 7 examined Canadian structural reforms in three provinces, particularly those that merged two of the three trial court levels and unified family law matters in a single trial court.

As the factual background and the perceptions and opinions of participants from the six field sites and from other jurisdictions have been drawn together, certain patterns have been highlighted. For example, the persistence of subordinate judicial officers has been observed in unified trial courts in the United States and Australia, and in some merged trial courts in Canada. This is not a revolutionary discovery, but is relevant to current arguments by reform advocates that unification is good because it promotes equality of judges. Similarly, case assignment patterns have been highlighted, because excessively strict specialization within formally unified trial courts has also reduced the equality of judges. These and other issues will need to be considered if further structural reform is planned.

This chapter will focus on emerging evidence about the structure of criminal trial courts and the possible consequences of a unified criminal court. It will do so because the current debate on trial court unification centres on placing all criminal matters into a single court. Civil matters are handled in one court in five out of ten provinces, family matters in three out of ten provinces, and criminal matters in none. Thus the one new step necessary to move from two trial courts to one trial court in most provinces is the unification of criminal matters in a single court.

Evidence is not available to assess many of the claims made in the debate on criminal court unification. For example, there are no data on public perceptions of judges that differentiate between levels of court, to test the argument of unification supporters that Provincial Courts are "at the low end of a qualitative hierarchy." [Law Reform Commission of Canada, Working Paper 59, I.A., p. 13] Furthermore, evidence that is available must be used with caution, both because of its built-in limitations and because the validity of applying the evidence to the merits of a unified criminal court is still problematic. For example, the feasibility of a unified criminal court cannot simply be extrapolated from the success of the merger of superior and county courts over the past two decades. Conversely, however, the lessons of successful mergers cannot be ignored.

After a brief introduction, the chapter will proceed as follows:

- Data on the pace of criminal litigation will be examined to see whether our current trial court structure contributes to court delay. Initial analysis suggests that it does, but also points to a number of other factors associated with delay.

- The conditions under which a hierarchy of courts reduces the morale of lower court judges will be explored.

- Efforts to cope with the current court structure will be examined, and concern will be raised that some of these efforts may be worse than the ills they sought to address.

- The extent to which procedural and administrative changes other than jurisdictional unification can deal with criminal court problems will be addressed.

- The consequences of criminal court unification for the overall workload of a one-level trial court will be considered, along with the extent to which subordinate judicial officers (in particular, justices of the peace) may be necessary.

DEBATING THE UNIFIED CRIMINAL COURT

"Confusion, complexity, inequality and inefficiency" are the "serious defects" of our criminal trial courts, in the words of Working Paper 59 of the Law Reform Commission of Canada. The Working Paper goes further, arguing that "a confluence of such features" may have "negative side-effects" including "the possible deterioration in public respect for the courts as an institution and increased costs in the administration of justice." [p. 21] These concerns are echoed in the arguments of former Ontario Attorney General Ian Scott in endorsing a unified trial court for civil, criminal and family cases, and supported most prominently by other attorneys general and the Provincial Court bench.

In the eyes of opponents of the unified criminal court, these assertions are either incorrect, unfounded, or not effectively linked to a structural solution: confusion and complexity are exaggerated, and have not hindered the effectiveness of crown counsel or defence counsel; inefficiencies, epitomized by excessive delays, are best dealt with by other means. Status inequalities among judges can also be dealt with by other means; to the extent that they reflect the hierarchy of judicial authority, say opponents, they confuse jurisdictional distinctions with conclusions about quality of work and individual competence. Opponents, led by but not confined to superior court judges, thus argue that creating a unified criminal court would not produce the expected benefits. They also argue that it would create additional problems. Criminal defence lawyers are concerned that it would jeopardize the preliminary inquiry, which would under unification be conducted before a member of the same court that tried the case.

Whatever the merits of these contending positions, the opponents appear to have seized the advantage from the reformers, with the Canadian Bar Association Task Force critical of the concept, and all but one provincial government placing its priorities elsewhere. Nevertheless, the support shown for the concept in New Brunswick could provide an opportunity to test the merits of the unified structure in a smaller and thus more workable jurisdiction. To the extent that the unified criminal court remains a plausible alternative to the status quo, perhaps it will also lead opponents to press more vigourously for other remedies for excessive delays, inefficiencies and status inequalities.

Debates over court structure often turn on which side successfully shifts the burden of proof. Reformers argue for the simplicity of a unified structure, asking opponents to demonstrate why a more complex structure is necessary. Opponents are then on the defensive, having to argue that the complexities of the system will remain, and can only be addressed by other means. Opponents may take the offensive by arguing that the present system is running well and doesn't need changing, requiring reformers to document the system's evils. When it is possible to document system problems – and informed members of the general public can quickly and thoroughly find faults in the current operation of our criminal courts – opponents then shift to the position that system problems cannot be addressed by structural change.

As merger progressed in the 1980's, the burden of proof shifted to the opponents, who were pressed to show why two section 96 courts were still needed. Manitoba's Law Reform Commission took this approach in its report supporting merger. With the unified criminal court, opponents are showing their strength, suggesting that the first step in considering evidence should be to examine the operation of the present system.

The Law Reform Commission of Canada's Working Paper was criticized for not basing its conclusions on empirical data, but the Commission's best efforts uncovered none, as it summarized in Appendix F. [I.A., pp. 71-72] Even the statistics presented in Appendix F were not in a form that allowed any conclusions to be drawn. Analysis of the figures in Appendix F leads to the conclusion that Provincial Courts deal with between 94 and 99.4 percent of the criminal work in the six provinces for which data are available. Taken by themselves, these figures make it appear that Canadian criminal courts are almost unified already, since the numbers do not convey the jurisdictional differences between the Provincial Courts and the section 96 courts, and the fact that a trial by jury is available only in a section 96 court.

The field work done for this report did not focus on the operation of the criminal courts. It did provide some insight into the conditions under which hierarchical differences between judges become important, and these will be discussed below. To examine evidence about delays and inefficiencies in criminal litigation requires us to look elsewhere. Therefore, the following section will draw on a data base of over 2,800 criminal cases gathered for a study of the pace of criminal litigation in Ontario, New Brunswick and British Columbia conducted in 1988-89 under the auspices of a grant from the Social Sciences and Humanities Research Council of Canada. The study has gained notoriety from the inclusion of some of its findings in the reasons for judgment of Mr. Justice Peter Cory, speaking for the majority of the Supreme Court of Canada in Regina v. Askov et al. (October 18, 1990).

CRIMINAL COURT DELAY AND COURT STRUCTURE

The judgment in Askov emphasized the differences between criminal court delays in Canada and the United States, in particular the substantially longer time taken by criminal cases in Brampton, Ontario. The exceptional delays reported in Brampton have deflected discussion from the more fundamental findings about the pace of litigation in Canada. Large numbers of criminal cases that proceed in section 96 courts wait long periods of time before trial or other disposition. Those delays are particularly large when measured from the date of first appearance in Provincial Court to the date of disposition in the section 96 court. While most section 96 courts believe they are expeditious in handling normal criminal cases, the total time for those cases to move through the criminal trial courts remains high.

Relevant figures are summarized in Tables 8-1 and 8-2 on the next two pages. The first table looks only at the upper court time, measured from the receipt of the information in the section 96 court (usually within a few days after committal in Provincial Court). The first column reports the time for the median or middle case. New Brunswick's Court of Queen's Bench is the most expeditious in the three provinces, completing half its cases in 72 days. The two British Columbia courts and four of the five Ontario courts then range from one month to almost three months longer. Only Brampton is far out of range at 423 days, or 14 months before half the 1987 District Court cases were completed.

Examining only the median time, however, would not accurately convey the overall performance of these courts, because it may take considerably longer to complete a larger proportion of their criminal cases. On this basis, New Brunswick again is clearly the most expeditious, handling 90 percent of its cases in 142 days (less than five months). On this basis, the London, Ontario, District Court had a substantially stronger performance than any of the other Ontario or British Columbia courts in the study, handling 90 percent of its cases in 202 days (less than seven months).

In contrast, Vancouver and Toronto took much longer to complete the bulk of their cases. Vancouver took almost 11 months (329 days) to complete 90 percent of its criminal cases – three times as long as the median case. Toronto's District Court took over eight months (251 days) to complete 75 percent of its criminal cases. Thus Toronto took 133 days to finish 50 percent of its cases, but another 118 days to complete the next 25 percent, not a surprising finding to those familiar with the extensive overbooking practiced in the Toronto District Court at that time.

It may be that the slower cases were delayed for reasons beyond the control of the court, and that accused persons may have waived their Charter right to trial within a reasonable time. This information could not be obtained from the court files used to collect data on elapsed times. However, if an eight-month standard had been applied to the Toronto District Court in 1987, when that court did not have any delays that stood out from section 96 courts elsewhere in Ontario or in British Columbia, as many as one in four of its cases could have been in jeopardy.

Table 8-2 presents the total time from first appearance in Provincial Court to disposition for the cases shown in Table 8-1. The total time would obviously be somewhat longer than upper court time alone, but the table shows that the median times are more than double for all but New Westminster, B.C., and Brampton, which had the slowest median upper court times. The times do not go up quite as sharply for 75 and 90 percent of the cases, suggesting that Provincial Courts do not take as long to complete most of their preliminary inquiries as section 96 courts take to bring the case to a final determination. But the total elapsed times remain very high. In St. Catharines, for example, where no complaints arose from the bar, it took almost a year to handle half the cases.

Why are there no complaints in St. Catharines or in other communities with similar delay figures? Perhaps the public is not concerned about cases taking that long, but this conclusion is highly dubious. It is more likely that the bar is not worried as long as trial dates are available when counsel are ready. There is a tendency to grow accustomed to a certain pattern of case processing, and tailor one's expectations to that pattern – what has come to be termed "the local legal culture." This may explain why the problems of delay in Provincial Courts have become particularly intractable in Ontario. There, a six-month period from first appearance to committal would be quite acceptable in many locations, even though other provinces would see a six-month delay as a sign of impending crisis. If the courts in a community normally secured a committal within six months and rendered judgment six months later, the process would require a full year – a long time for a typical case even though each court kept within "acceptable" limits.

Table 8-1

Upper Court Disposition Time[a] in Canadian Criminal Cases, 1987[b]

Location	Median (in days)	75th Percent	90th Percent	Percent Cases Over 150 Days
New Brunswick Ct. of Queen's Bench[c]	72	102	142	9 %
Vancouver, B. C. County Ct.	101	198	329	38
London, Ont. District Ct.	105	142	202	21
Toronto, Ont. District Ct.	133	251	409	43
Ottawa, Ont. District Ct.	136	238	322	46
St. Catharines, Ont. District Ct.[d]	144	233	409	47
New Westminster, B. C. County Ct.	154	216	314	51
Brampton, Ont. District Ct.	423	497	675	84

[a] Upper court disposition time measures number of days from receipt of the information in the County, District or Queen's Bench Court to date of guilty plea, judgment, withdrawl, stay or dismissal.

[b] Ontario and New Brunswick cases were disposed of in 1987 (except as noted in [c] and [d] below), while British Columbia cases were received in 1987.

[c] Includes all 1987 and 1988 dispositions in Fredericton and Moncton, and all 1987 dispositions in Saint John.

[d] Includes all 1985-87 dispositions.

Note: Table 8-1 is designed to facilitate comparison with Table 2G in Barry Mahoney, Changing Times in Trial Courts (Williamsburg, Va.: National Center for State Courts, 1988), p. 33.

Table 8-2

Total Disposition Time[a] in Canadian Criminal Cases Disposed of in Upper Court, 1987[b]

Location	Median (in days)	75th Percent	90th Percent	Percent Cases Over 180 Days
New Brunswick Ct. of Queen's Bench[c]	152	198	271	36 %
Vancouver, B. C. County Ct.	224	335	489	65
London, Ont. District Ct.	239	309	399	72
New Westminster, B. C. County Ct	284	387	492	85
Ottawa, Ont. District Ct.	315	432	558	81
Toronto, Ont. District Ct.	327	457	628	78
St. Catharines, Ont. District Ct.[d]	349	504	667	89
Brampton, Ont. District Ct.	607	732	896	95

[a] Total disposition time measures number of days from first appearance in Provincial Court to disposition in the County, District or Queen's Bench Court by guilty plea, judgment, withdrawl, stay or dismissal.

[b] Ontario and New Brunswick cases were disposed of in 1987 (except as noted in [c] and [d] below), while British Columbia cases were received in 1987.

[c] Includes all 1987 and 1988 dispositions in Fredericton and Moncton, and all 1987 dispositions in Saint John.

[d] Includes all 1985-87 dispositions.

Note: Table 8-2 is designed to facilitate comparison with Table 2F in Barry Mahoney, Changing Times in Trial Courts (Williamsburg, Va.: National Center for State Courts, 1988), p. 32.

One way to assess the pace of criminal litigation in the three provinces is to compare the figures in Tables 8-1 and 8-2 with comparable figures in other jurisdictions. Extensive studies in the United States provide data for a number of American trial courts, and data have also been collected for the state of Victoria, Australia (including the city of Melbourne). The Lord Chancellor's Department has developed figures for the Crown Courts in England and Wales, but they are not comparable and will therefore be considered separately below.

Tables 8-3 and 8-4 rank Canadian, American and Australian court locations in terms of the amount of time they take to handle 75 percent of their criminal cases. Table 8-3 ranks the courts by upper court time.

Table 8-3

Upper Court Disposition Times for 75% of Criminal Cases, Canadian, United States and Australian Locations

Location	75th Percent (in days)
San Diego, California	72
Detroit Recorders Court, Mich.	80
Dayton, Ohio	85
New Brunswick (Ct. of Q.B.)	102
New Orleans, Louisiana	105
Phoenix, Arizona	105
Portland, Oregon	108
London, Ont. (District Ct.)	142
Oakland, California	144
Wichita, Kansas	156
Wayne County, Michigan	158
Minneapolis, Minnesota	162
Pittsburgh, Pennsylvania	165
Providence, Rhode Island	175
Cleveland, Ohio	185
Vancouver, B.C. (County Ct.)	198
New Westminster, B.C. (Co. Ct.)	216
St. Catharines, Ont. (Dist. Ct.)	233
Jersey City, New Jersey	234
Ottawa, Ont. (District Ct.)	238
Toronto, Ont. (District Ct.)	251
Miami, Florida	257
Bronx, New York	277
Newark, New Jersey	294
Victoria, Australia	381
Brampton, Ont. (District Ct.)	497
Boston, Massachusetts	665

See notes accompanying Table 8-1.

Table 8-4

Total Times for 75% of Criminal Cases Disposed of in Upper Court, Canadian, United States and Australian Locations

Location	75th Percent (in days)
Portland, Oregon	89
Dayton, Ohio	101
Detroit Recorders Court, Mich.	109
Phoenix, Arizona	125
San Diego, California	132
New Orleans, Louisiana	142
Wichita, Kansas	156
Minneapolis, Minnesota	162
New Brunswick (Ct. of Q.B.)	198
Pittsburgh, Pennsylvania	202
Cleveland, Ohio	207
Oakland, California	211
Providence, Rhode Island	224
Miami, Florida	241
Jersey City, New Jersey	264
Wayne County, Michigan	296
London, Ont. (District Ct.)	309
Vancouver, B.C. (County Ct.)	335
New Westminster, B.C. (Co. Ct.)	387
Ottawa, Ont. (District Ct.)	432
Toronto, Ont. (District Ct.)	457
Newark, New Jersey	486
St. Catharines, Ont. (Dist. Ct.)	504
Victoria, Australia	645
Brampton, Ont. (District Ct.)	732

See notes accompanying Table 8-2.

and Table 8-4 by total time. Canadian courts are shown in bold face and American courts in plain text; Victoria, Australia, is underlined.

The rankings are easy to visualize. In Table 8-3, measuring only upper court time, the New Brunswick Court of Queen's Bench outperforms all but three American courts, and the London, Ontario, District Court outperforms two-thirds of the American courts (12 out of 18). The six remaining Canadian courts rank much lower. Thirteen of 18 United States courts are more expeditious than the two British Columbia County Courts. All Canadian courts except the Brampton District Court are more expeditious than those in Victoria, Australia. In Table 8-3, Brampton does finish ahead of one American city: Boston, Massachusetts. Note however that a more recent study shows Boston having reduced this figure to under 430 days, two months faster than the 1987 Brampton figure. [Goerdt, II.A., p. 56]

Thus the upper court times in Canadian courts, with two strong exceptions out of eight, fare poorly in comparison with the United States, and the comparative performance would have been weaker still if median times had been used. Yet examination of the total times, as shown in Table 8-4, reveals an even poorer performance in comparative terms. New Brunswick drops to the middle, more expeditious than eight of 16 American courts, while London, Ontario, falls behind 15 of 16. In fact, only Newark, New Jersey, of the 16 American courts has a higher total time figure than any of the seven court locations studied in both Ontario and British Columbia.

Taken together, Tables 8-3 and 8-4 show that the pace of litigation in Canadian criminal cases is comparatively slower when considering the total time to complete cases, rather than the upper court time alone. In other words, lower court intake processes in the United States add less time to criminal cases than Provincial Court processes do in Canada. Only two American court locations on this list have unified criminal courts: Wichita, Kansas, and Minneapolis; and one court location (Miami) uses direct filing in felony cases, bringing felonies directly to the superior court. Thus the more expeditious pace of litigation in the United States appears primarily to reflect faster intake processes rather than faster processes in the superior courts.

The Canadian-American differences in lower court processes reflect quite different approaches that American states and Canadian provinces have taken in the past generation. In Canada, Provincial Courts have grown in jurisdiction and importance; in the United States, criminal intake courts have atrophied. None of the state court systems in Table 8-4 allows lower courts to try felonies; in contrast, Canadian Provincial Courts try many more indictable offences than do the section 96 courts. As the Canadian Provincial Courts grow in importance, their processes become or remain more elaborate than the processes in rapid-fire American lower courts.

Canadian-American differences in court administration may also be critical to any explanation of the slower total time of Canadian criminal cases. In Canada, each level of court has its own chief justice or chief judge, and very little attention is given to how the two levels mesh with one another. In the United States, the chief justice of a state's highest court is usually responsible for the administration of all levels of trial courts. Thus more attention is given to the litigation process as a whole than is true in Canada.

The relative importance of this second factor may be reinforced by examining the pace of criminal litigation in England and Wales. The Crown Court, which has jurisdiction over all felonies, is very expeditious throughout the country. Annual Reports from the Lord Chancellor's Department, which is responsible for administration of the Crown Court, show the "average waiting time" for all six regions from "date of committal to start of hearing" was just over 12 weeks, or less than 90 days, in both 1988 and 1989. Wales and Chester averaged just under eight weeks in 1989. London was four weeks slower than any other region at 17.4 weeks, down from 18.6 weeks in 1988.

The Lord Chancellor's Department figures are not strictly comparable to those in Table 8-1 for a number of reasons; for example, they end at the start of the hearing and not the disposition date. But they still suggest a strong performance by the Crown Court. What is not shown, however, is the time from first appearance to committal in the Magistrate's Courts. Figures for the Magistrate's Courts are less detailed, but they suggest that the waiting time is actually longer than in the Crown Court, with a national average estimated at 120 days from first appearance to committal.

One reason for both the lack of equivalent statistics and the additional delays is that the Magistrate's Courts are administered by a completely different cabinet department, the Home Office. As a result, the separation of the judiciary is accentuated further by the separate administration of the two courts. Ironically, the Crown Court has been praised for bringing diverse judges (High Court justices, County Court judges and recorders) into a single coherently-managed criminal court, but it left out the largest group of judicial officers, the lay magistrates. As a result, the expeditious work of the Crown Court is mitigated by serious delays in Magistrate's Courts – made more surprising by the fact that preliminary inquiries are held in only a small percentage of cases committed to trial in the Crown Court.

This analysis suggests that having two independently operating trial courts sequentially handling major criminal cases adds in practice to the time those cases take to move from initiation to disposition. This does not mean that a unified criminal court would automatically reduce delay, but does mean that the new framework should be able to develop effective means to reduce the elapsed time of cases previously handled by both trial courts. Conversely, however, the American data[8] show that a two-level trial court – still the typical court structure in the United States – is capable of substantially reducing delay, once judges and court administrators focus on the process as a whole rather than only one of the two steps.

This section has focused on the effect of a two-part criminal case process on the pace of criminal litigation. While the two-court process increases the time for cases to proceed to disposition, it is not the only factor associated with longer elapsed times. One of the most important explanatory variables is the number of court appearances – the greater the number of appearances, the slower the pace of litigation. Cases that end in a plea of guilty do not take as long as cases that go to a jury. Cases in which the accused is in custody do not take as long as cases in which the accused is out of custody. None of these findings would be startling to those familiar with the workings of Canadian criminal courts. But they stand as reminders that characteristics of criminal cases and the criminal process will continue to slow the pace of litigation, whether trial courts are unified or not.

At the same time, however, the existence of two separate and separately-administered trial courts appears to have other effects that slow the pace of criminal cases. Thus, for example, an accused person who prefers to put off the ultimate disposition of charges against him could take advantage of the present system by electing trial by jury in a section 96 court only to reelect to go before a judge alone for the purpose of entering a plea of guilty. This is a common occurrence in some provinces, and is an acknowledged defence strategy.

Data from the five Ontario District Court locations provide persuasive evidence of the operation of this strategy. An examination of the committals in those five locations revealed that the preliminary hearing was waived in 39 to 49 percent of the cases. Toronto had the highest waiver rate at 48.6 percent, followed by Ottawa with 48.2 percent. The cases in the five courts were then examined in two separate groups, cases where the prelim was held and cases where it was waived. Those who hope that eliminating preliminary hearings will reduce the time from first appearance to committal will be disappointed by the results. There was no difference between the time from first appearance to committal for cases in which the prelim was held or waived. On reflection, this is not surprising, since the usual pattern in Ontario is to waive the prelim at a later stage in the process, not at the time the hearing date is originally set.

What was surprising at first was to discover that cases in which the preliminary hearing was waived took less time in the District Court phase of the process – and this occurred in all five Ontario locations. One observer suggested that perhaps delays in preparing the transcript of the preliminary hearing would explain the delay. Others suggested that the preliminary hearing was more likely to be waived by an accused who wished to enter a plea of guilty at a later time or before a judge from another court.

These two competing explanations were tested by examining whether the dispositions in District Court varied by whether the preliminary hearing was held or waived. If the percentage of guilty pleas in District Court was higher following waiver of the preliminary hearing, this would lend support to the theory that a defence strategy was at work. If disposition patterns were the same, transcript delays would be a more plausible explanation. Reexamination of the data showed in fact that in every one of the five District Courts, the guilty plea rate was higher for cases in which the preliminary hearing was waived than it was for cases in which the preliminary hearing was held.

Thus these findings suggest that the existence of a two-level criminal trial court has led in Ontario to the development of defence strategies that take advantage of extended delays. Whether similar strategies operate in other provinces cannot be determined from the pace-of-litigation data reported here. One reason is that in British Columbia, preliminary hearings are not waived. They were held in over 98 percent of the Vancouver and New Westminster cases collected in the study. Waivers were somewhat more frequent in New Brunswick (in 20 percent of the cases), but numbers were too small to identify a pattern. Anecdotal evidence suggests that accused persons may take advantage of the two-level court system. A decade ago, the Provincial Court in Hull, Quebec, faced delays of 13 months to a trial date in criminal cases. A concerted effort over the next two years cut the waiting time by more than half, but increased the number of accused persons who elected to be tried by judge and jury in the Superior Court.

HIERARCHY AND INFERIORITY

Whether two levels of criminal trial courts contribute to unnecessary delay can be debated at length. However suggestive the above data are, they are subject to differing interpretations, and will hopefully be only the beginning of the systematic analysis of criminal case processing in Canada. At the same time, it is helpful to have some numbers to hold up against our experience and our intuitive notions about how the system works. When one tries to examine the conditions under which a hierarchy of courts reduces the morale of lower court judges, even the initial numbers are absent.

Despite the absence of quantitative data (even poll results might prove interesting), the field work suggested some patterns that may be more widespread. The court systems in which inequalities in the status of judges from different courts are most contentious are those systems in which the lower courts have been most effectively professionalized. For example, the pressure for a one-level court was stronger in Minnesota than in Illinois or South Dakota, because the Minnesota county and municipal courts had already been reorganized and expanded, with a complement of full-time, law-trained and experienced judges. The other two states moved directly from a network of part-time and lay judges to a unified trial court, so a hierarchy of circuit judges and associate judges, or judges and magistrates, was retained, and has been more readily accepted by the subordinate judges for many years.

Given this pattern, it is not surprising that Canadian Provincial Court judges have been so vigourous in their advocacy of a unified trial court. They are more highly professionalized than most lower court judges in the United States, and have been for a longer time. While lay judges are still found in many American jurisdictions, no lay judges have been appointed in Canada since Newfoundland abandoned the practice a decade ago. And unlike American states that have lay judges, Newfoundland sent its non-lawyer Provincial Court judges to Dalhousie Law School after they completed three years on the bench. The emphasis on legal training, requirements of five and ten years at the bar, and full-time appointments with permanent tenure until a fixed retirement age have combined to produce a Provincial Court bench much more likely to take offence at inferior treatment.

Thus the very steps that improved the status of provincially-appointed judges may have contributed to what a generation ago was termed "the revolution of rising expectations." The very existence of proposals for a single trial court with a single class of judge having complete jurisdiction over the trial of criminal matters illustrates the enormous changes in Canadian courts in little more than 20 years.

Contrast the unified criminal court proposals with the recommendations of the Canadian Committee on Corrections, its its report Toward Unity: Criminal Justice and Corrections, released March 31, 1969. The committee was chaired by Justice Roger Ouimet of the Superior Court in Montreal; the vice-chair was senior criminal counsel G. Arthur Martin of Toronto, who went on to a distinguished career on the Ontario Court of Appeal. Its report dealt with a full range of criminal justice issues. "The Criminal Court" was dealt with in one ten-page chapter, out of 25 chapters in the report.

The chapter focused on the provincial magistrates' courts, and called for many changes, but they were by way of appropriate nationwide standards rather than structural prescriptions. Those standards reflected the nonprofessional status of the magistrates' courts of the late 1960s:

> A judge in a criminal case should be legally qualified. [I.A., p. 166]
>
> A judge should not be liable to be regarded as part of the police apparatus.
>
> The court should not be confused with the police station. [I.A., p. 167]
>
> Confusion should be avoided. [I.A., p. 170]

One paragraph on physical facilities notes that ventilation and acoustics in many courts work at cross purposes: the only way to avoid overheating is to open the windows, creating a noise problem. [I.A., p. 169]

A reading of the Ouimet Report gives the flavour of a municipally based court, often with lay judges, often sharing space with the police. It appears far removed from the superior courts of the time. To imagine in 1969 that the Attorney General of the country's largest province would suggest, only 20 years and one month later, that the successor to the old magistrate's courts should be merged with the successor to the High Court of Justice would have seemed incredible. Now the idea is taken seriously by its friends and foes alike.

Other matters, however, have perhaps not changed as radically. The longest section of the criminal court chapter is devoted to amplifying the statement: "Delay should be avoided." [I.A., p. 170] Among other things, the committee concludes that "[i]n many courts in Canada no one appears to be in charge of administration." [p. 172] And it concludes that "[a]lthough the crown attorney in many municipalities has control of the scheduling of cases, it would be preferable to have a magistrate perform the function of reducing delay." [p. 171]

This analysis provides an understanding of why issues of status and morale have intensified in Canadian Provincial Courts, but does not suggest alternatives for dealing with these issues. If morale has declined as a byproduct of an increase in the professionalism and quality of the Provincial Court bench, few would recommend deprofessionalizing that court. (Note however that American lawyer-political scientist Marie Provine, in Judging Credentials [II.A.], argues on behalf of the lay judges in New York State.) Field work suggests other alternatives. Note for example that associate circuit judges in Illinois are often promoted to circuit judge, so that an associate judgeship becomes an acknowledged training ground. Qualified and experienced associate judges may also be assigned to a wide range of general jurisdiction matters. Before Minnesota's unification, it was also common for county and municipal judges to be promoted to the District Court bench, and unification opponents cited the opportunity for lower court experience as a major advantage of the two-level system, especially in Minneapolis. Note however that frequent promotion did not prevent county and municipal judges from continuing to press for a one-level trial court.

In contrast, Canadian Provincial Court judges rarely secure later appointments to section 96 courts. The few examples that come to mind serve more to illustrate the novelty of the event. A lawyer who accepts a Provincial Court appointment must realize that he or she is entering a separate career stream. This reality may reflect the existing subject matter divisions between section 96 courts and Provincial Courts. A Provincial Court judge will become a specialist in areas of law less frequently found in section 96 courts, so that a lawyer who refuses the judgeship and remains in private practice for another decade may be in a better position to secure a section 96 appointment. In the result, excellent provincially appointed judges are not given sufficient consideration when superior court vacancies arise.

The appointment process in Canada may itself make a difference. Minnesota county and district judges were all appointed by the state governor, not by two different levels of government, as in Canada. Note however that it is more common for the United States federal government to appoint state judges to the federal courts than for the Canadian federal government to appoint Provincial Court judges to section 96 courts. So the split appointment process is not an adequate explanation by itself.

It may be useful to know which provinces have had the greatest number of Provincial Court judges appointed to section 96 courts, to see whether provincial screening and appointment procedures have any effect. It appears that British Columbia and Quebec, which have had the longest and most successful experience with judicial nominating bodies, have more former Provincial Court judges on their superior court, suggesting that effective, continuing screening processes may play an important part in increasing the number of Provincial Court judges receiving section 96 appointments. Ten section 96 judges in B.C. previously sat in Provincial Court, including one member of the Court of Appeal. Thus the commitment of provincial governments to appoint the best qualified and most respected people to the bench, after encouraging their application and nomination through a process that commands the respect of the community, should materially increase the probability that these appointees will continue their career on the superior court.

The previous chapter argued that increasing the breadth and depth of court work could be expected to improve morale within section 96 courts. Reference was made there to provincial statutes that authorize section 96 judges to sit in Provincial Courts. Perhaps the same benefits would accrue if provinces allowed Provincial Court judges to be assigned to sit on cases within the jurisdiction of section 96 courts, just as Illinois' associate judges are assigned to circuit judge matters. Workable forms of interchange should be possible even within the constitutional strictures of section 96. A section 96 appointment is not likely to be required constitutionally before a provincially-appointed judge could preside over a variety of criminal, civil and family matters currently heard in provincial superior courts (e.g. judge-alone criminal trials, civil cases under $20,000., and additional matters by consent).

These approaches to deal with the status and morale problems identified by the Law Reform Commission of Canada as grounds for a unified criminal court may have only limited effectiveness. But the fact that they are either rarely used (elevation) or never considered (reassignment) suggests how wide the gap between the two trial court levels is in most provinces. If these approaches improve the quality of justice in existing trial courts, it must be hoped that existing conflicts over structure and policy do not hinder their adoption.

COPING WITH THE CURRENT COURT STRUCTURE

Previous analysis of data on the pace of criminal litigation suggests that delays expand when two courts are involved in the process, and the second court is often brought in as a defence strategy. Both of these points need to be examined with greater care, because they have led to responses by section 96 courts that may on one hand promote delays and on the other hand limit the legitimate options of accused persons.

Some observers have argued that cases tried in section 96 courts ought to take longer to move from initiation to disposition. In their view, the elapsed time may simply reflect the fact that the most difficult cases – those requiring more extensive preparation, greater disclosure of evidence, and longer trials – come before the section 96 courts, while cases with fewer witnesses and greater likelihood of guilty pleas come before the Provincial Court. Both courts deal with cases involving serious penalties, but if the section 96 courts handle more complex cases, the amount of delay necessary for the preparation of the case by both the crown and the defence will increase.

While this argument makes sense, it does not reflect the reality of section 96 courts. A large number of cases before those courts are not materially different from indictable offences heard in the Provincial Courts. Initial analysis of the cases in the three-province empirical study shows that in over half the cases in which an accused was found guilty or pleaded guilty, the sentence was less than six months in jail – a penalty that could have been meted out in a summary conviction proceeding. Furthermore, little of the time that elapses in a criminal case can be attributed to preparation by counsel; most of it is taken up waiting for events that could have occurred weeks or months earlier, had a judge been available or had busy crown or defence counsel not been working on other matters.

Section 96 judges realize that they often are called upon to deal with criminal cases that could as appropriately (or more appropriately) be dealt with in the Provincial Court, without taking the added time of a second court. As a result, section 96 judges and their courts have developed a variety of responses to avoid what they see as unnecessary time in court and unnecessary delays from initiation to disposition of the case. Two types of responses will be highlighted here.

In many trial courts, means have developed so that an accused person can learn prior to trial about the sentence likely to be sought by the crown following a judgment or a plea of guilty. This would allow the accused to consider whether to enter a plea at that stage rather than face trial. Pretrial discussions about sentence are a common practice in criminal courts. In Ontario courts, section 96 judges have used the pretrial conference as an occasion for discussing the sentence that could follow from a plea of guilty.

If a court finds that trials are growing in number and frequency, pleas of guilty may be encouraged. Pretrial judges may express a view on the length of sentence, and urge that a guilty plea be considered in lieu of a trial. A trial coordinator may schedule cases before a judge whose sentencing practices would encourage the entering of pleas of guilty. If defence counsel find that either of these practices are followed in a section 96 court, however, they might be expected to advise a client to elect to be tried in that court rather than in Provincial Court, in the hope of receiving a more favourable sentence after pleading guilty. Once this occurs, the section 96 court may find that while the proportion of guilty pleas to trials has increased, reducing time spent in court, the overall caseload has increased. The court has become a more popular venue, and is acquiring more business.

Evidence from the three-province study suggests that this development has occurred in Ontario. The number of criminal cases disposed of per capita in Ontario District Courts is dramatically higher than in the New Brunswick Court of Queen's Bench. For example, the St. Catharines District Court, which serves a population similar in size to that served by Queen's Bench in Saint John or Moncton, New Brunswick, averaged 86 criminal dispositions per year from 1985 to 1987, compared with the 1987 Saint John total of 29, and Moncton's two-year (1987-88) total of 22. Interviews in Toronto indicated that the District Court criminal trial coordinator's office was a hub of plea discussions. Interviews in Ottawa attributed the District Court's increased criminal caseload to a willingness to give more lenient sentences at the pretrial stage. One apparent result was that the proportion of the District Court's criminal caseload made up of narcotics cases was higher in Ottawa than in Toronto, Vancouver or Brampton, usually regarded as centres where narcotics cases are more significant.

When a section 96 court is perceived as following a pattern of sentencing similar to, or perhaps more lenient than, the pattern followed in the Provincial Court, the criminal caseload of the section 96 court is likely to increase, and the pace of criminal litigation is likely to slow down. Knowing this, the judges of a superior court may conclude that inappropriate cases are being brought there – cases that are unlikely to go to trial and unlikely to require the more thorough and detailed consideration expected of their court. One way to ensure that fewer cases are brought to a superior court is for the court to acquire a reputation for giving out more severe sentences than the Provincial Court.

Data from the three-province study suggests that New Brunswick fits this description. Not only is the Queen's Bench caseload much smaller than Ontario's, but when accused persons choose not to proceed with a trial by judge and jury, they often reelect back to the Provincial Court for trial, in contrast to Ontario where accused persons almost always reelect trial by judge alone (often to enter a plea of guilty). Interviews indicate that the Quebec Superior Court also has a reputation for more severe sentences than the Cour du Quebec. Montreal practitioners refer to the "assize tax" that accused persons pay to go to trial in the Superior Court.

The fact that the pace of criminal litigation in Quebec and New Brunswick is faster than in other provinces suggests that the approach that characterizes their superior courts has had a real effect on how criminal cases proceed through their court systems. At the same time, the results must be viewed with real concern. Since jury trials are only available in section 96 courts, the perception that those courts will be tougher at the time of sentencing could lead accused persons to choose not to exercise their constitutional right to a trial by jury when they might otherwise do so.

In the aftermath of the Askov case in Ontario, as the new Ontario Court of Justice (General Division) sought to cope with a backlog of cases that might never be reached on the merits, the temptation to discourage accused persons from electing a General Division trial could also have increased. Lawyers in one region have referred to an "entertainment tax" that they feared would become an established pattern; however, there are no signs yet of more widespread adoption of this approach in the General Division.

The issues discussed in this section are sensitive ones. The public expects the judiciary to sentence fairly, and that requires a combination of discretion and uniformity that makes it difficult to discuss the kinds of sentence disparities with which lawyers and judges are so familiar. Differences in sentences will always exist. What is essential, however, is that the way our courts are structured and the way they operate not accentuate or encourage those differences.

Criminal practitioners in Canada look with legitimate concern at the use of plea bargaining in many American courts, fearing that if the practice of exchanging a plea of guilty for a lenient sentence were to take hold in Canada, defence counsel would have to advise clients with a strong case not to exercise their legal right to a trial lest the cost of losing be too high. Some of the current practices in Canada, often developed in response to real concerns about excessive delays and inadequate resources, could lead us into the same position.

It is therefore essential that effective delay reduction mechanisms be put in place. If not, the perception that an "assize tax" exists in a superior court could deter accused persons from going before the only court that provides a trial by jury. Such a result would be a more powerful argument for a unified criminal court than any thusfar advanced.

PROCEDURAL AND ADMINISTRATIVE CHANGES

This chapter is not an appropriate place to consider the broad issues of reducing delays and ensuring fairness in criminal cases. It is appropriate, however, to note some findings from field work in the United States that are relevant to concerns raised about the unified criminal court.

What is likely to happen to the preliminary inquiry in a unified court? Technically, it could be maintained, but would it prove less useful if conducted by a judge on the same court as the judge who would try the case? Evidence from the field work is uncertain, because the preliminary inquiry is less central to criminal case processing in the three states. Illinois and South Dakota have maintained the preliminary inquiry, but its use is in practice at the discretion of the prosecution. This was observed most dramatically in Sioux Falls, South Dakota, where the elected district attorney proceeded by grand jury in certain major cases so that he did not have to disclose evidence at a preliminary hearing early in the process. Minnesota abolished the preliminary hearing a few years before unification began, substituting an omnibus hearing which allows motions to suppress evidence to be dealt with early in the process. Given the importance of exclusionary rules in the United States, the omnibus hearing may thus be more important to both prosecution and defence than the traditional preliminary hearing.

In summary, the three states provide no useful clues about whether trial court unification will effect the viability of the preliminary inquiry in Canada. And given the infrequent use of the preliminary inquiry in New Brunswick today, it may be difficult to draw more general conclusions from that province's experience if it were to proceed with a unified criminal court. At the same time, it could be even more useful to examine whether expanded disclosure will increase the practice of waiving the preliminary inquiry in any event.

Given the analysis earlier that suggests that electing trial in a superior court following a preliminary inquiry may be made to lengthen the time from initiation to disposition of a case, a more modest but potentially important suggestion could be made. Maintain the preliminary inquiry, but give it priority in Provincial Court. Currently, Provincial Courts across Canada schedule prelims in the same way they schedule trials. If the first trial date is four months away, a preliminary inquiry would also be scheduled four months in the future. If preliminary inquiries were scheduled within 30 days of first appearance, for example, the accused's incentive to elect trial in a superior court as a way to lengthen the process would be eliminated.

This proposal may be attractive in some jurisdictions, but may have costs that would militate against its adoption in others. Regardless of its merits, however, its chief difficulty is that it proposes a change in Provincial Court procedures intended to improve the operation of the criminal trial process as a whole. Development and consideration of proposals like this would require the joint effort of Provincial Courts and superior courts. This kind of joint effort is still unusual in many provinces, even though increased discussions between the two court levels about common problems in the flow of cases could generate useful practical ideas about making the existing system work. Coordination of this sort could involve both judiciary and administration, and could operate without unifying the criminal court. When such coordination is absent, the arguments of those who support unification are reinforced.

To what extent will unification restrict the parties' range of choice, not only of the mode of trial, but of who will be the judge? To what extent is the choice of judge a legitimate matter to place within the discretion of the parties? A subtext of many court reforms deals with their potential effect on what is prejoratively termed "judge shopping". Interviews reported in Chapters Three and Six indicated how unification in South Dakota and merger in Alberta were accompanied by changes in civil case scheduling that eliminated the opportunity for counsel to pick their judge. Similar restrictions on the criminal side are also appropriate, but additional limitations are likely to meet resistance.

Interestingly, a limited form of choice is built into the criminal practice of all three American states in which field work was conducted. In each state, both prosecution and defence are entitled as a matter of right to exclude one judge. The practice is termed recusal. No bias need be alleged or proven. Recusals are frequent in these states. However, while they may be useful in eliminating an unwanted judge, they are not effective in securing a desired judge. And the recusal process has been subject to abuse. In one jurisdiction, an assistant district attorney unhappy with a defeat in front of a new judge began filing recusal motions in subsequent cases pending before that judge. A judge in another state, when questioned about this action, immediately recognized what was happening. "They're breaking [the new judge] in."

This automatic right to exclude one judge does not exist in this form in Canada. But some would argue that our system of elections and reelections accomplishes the same thing for a whole range of indictable offences. If this is so, an automatic exclusion may be a simpler and more expeditious method to accomplish this end, especially if there is a requirement to submit the request prior to the date scheduled for trial, so the case can be rescheduled promptly and another matter set down in its place.

Once again, what is essential is not a particular procedure, but an appreciation of the connections between the two trial court levels, so that a more effective and fair process can be designed. Chapter Seven discussed administrative unification (with Manitoba and Ontario as the best current examples) as a way to link trial courts without jurisdictional unification. However, the issues dealt with here focus on the flow of criminal cases through the courts, a subject that requires the attention of the judiciary. Without judicial involvement –

whether in a unified court or in a joint effort by two courts – a unified administrative staff will be left to focus on support services for the process and not the process itself.

THE SHAPE OF A UNIFIED CRIMINAL COURT

This chapter has thusfar emphasized challenges that face those who work in the Canadian criminal court system. It is difficult to say whether the current two-level court system can meet these challenges; it is even more difficult to predict whether a unified criminal court can do better. It is possible to surmise that failure to meet these problems within the existing court structure will make the unified court more attractive.

Given that possibility, it is important to consider what a unified criminal court would look like. For example, would the criminal business of a one-level trial court swamp the civil and family business? There is no indication that this has occurred in Illinois, South Dakota or Minnesota, so one might conclude that it would be unlikely to happen in Canada. Even if valid caseload data were available, it would be hard to estimate the amount of time necessary to handle different types of cases, especially since we have nothing comparable to the weighted caseload figures developed for many years in certain American jurisdictions.

An alternative way to measure the impact of unification on trial court workload would be to estimate the work by extrapolating from the current distribution of judgeships in each province. If the number of Provincial Court judges handling criminal matters is substantial enough, one could therefore predict that criminal work might dominate a province's unified trial court.

In the course of its research, the Court Reform Task Force of the Canadian Bar Association collected information from each province on the number of section 96 and Provincial Court judges as of May and June 1990. The results were made available for use here to avoid duplication of effort, although some errors were found in provinces for which other information was available. Furthermore, the usefulness of the figures varies from province to province, since only a few Provincial Courts are exclusively criminal while most do family matters and half do civil work.

In three provinces, Provincial Court judges do only criminal and youth matters, so the division is clearest. Prince Edward Island has three Provincial Court judges, while the Supreme Court (Trial Division) has four justices and an additional two supernumerary justices. (For the purposes of these estimates, chief judges and chief justices are included in the overall totals for their court, and supernumerary judges, who do not sit on a full-time basis, are noted separately.) New Brunswick has 22 Provincial Court judges plus four supernumeraries, while the Court of Queen's Bench has 22 justices (15 in the Trial Division and seven in the Family Division) plus three supernumeraries. Manitoba has 33 Provincial Court judges plus two supernumeraries, and 33 Queen's Bench justices plus two supernumeraries (25 sit in the General Division and eight in the Family Division). These figures clearly indicate that criminal matters will make up a larger proportion of the work of a unified trial court than either civil or family matters. In all three provinces, criminal work is likely to take up half or somewhat more than half of the sitting time, taking into account the proportion of superior court time spent on criminal matters. In Manitoba, this conclusion is reinforced when one takes account of the work currently done by part-time judges who preside at the request of the Chief Judge of the Provincial Court.

Two provinces divide criminal and family court work sharply enough at the Provincial Court level to allow an estimate to be made. Nova Scotia has 25 Provincial Court judges, 18 Family Court judges, 10 County Court judges and 13 Supreme Court justices. Ontario prior to its September 1, 1990, merger had 150 Provincial Court judges doing exclusively criminal work, 60 doing exclusively family, 11 civil and eight doing both criminal and family. Its Supreme and District Courts had 194 judges, plus supernumeraries. Both provinces make wide use of part-time deputy judges for small claims, and those judges are not included. Nor are Ontario's justices of the peace (those officials are discussed at greater length later in this section). The figures for Nova Scotia and Ontario, like those for PEI, New Brunswick and Manitoba, indicate again that criminal work would account for a larger proportion of the work of judges in a unified trial court than either civil or family matters, but perhaps no more than 50 percent over all. Note however that Ontario has added a substantial number of Provincial Court judges to handle criminal cases since the Supreme Court of Canada judgment in Askov.

Table 8-5

Justices of the Peace in Ontario, February 1991

Direction (Duties)	Full-Time Salaried	Part-Time	Civil Servants	Total
A or A-Expanded	92	176	63	331
B	0	80	18	98
C	0	29	2	31
Total	92	285	83	460

Notes: Figures do not include justices of the peace with a D direction.

The D direction is for signing authority on court documents. The C direction adds authority for issuing search warrants. The B direction adds bail hearings. The A direction adds all Provincial Offences, and the A-Expanded also adds federal statutes.

Those with A and A-Expanded directions are for the most part presiding JPs. There are no estimates available for the amount of work done by part-time JPs, but a number of them apparently sit on close to a full time basis.

In the other five provinces, Provincial Court judges handle civil, criminal and family cases. While criminal matters predominate in every Provincial Court except perhaps Quebec, responses to the CBA Task Force survey did not include an estimate of what proportion of time is spent in each area. The proportion of provincially-appointed to federally-appointed trial judges ranges from 279-109 in Quebec to 112-83 in British Columbia. In between are Alberta (117-64), Newfoundland (26-18) and Saskatchewan (45-30). (The Alberta figure is the only one that includes supernumerary superior court justices.) Similarly, territorial judges outnumber Supreme Court justices in both the Northwest Territories (5-3) and the Yukon (3-1).

Taken as a whole, the judgeship figures clearly lead to the conclusion that criminal matters would make up a larger proportion of the work of a unified trial court than either civil or family matters in every jurisdiction. Using the judgeship figures alone, criminal work would account for approximately 50 percent of the judges' time, and in no province would criminal work take up more than 60 percent of judges' time. Note however that the amount of off-the-bench time for research and preparation of judgments is currently much higher for superior court justices than for Provincial Court judges; therefore, if trial court unification increased that time for former Provincial Court judges, the redistribution of work might result in proportions higher than 50 percent.

Under these circumstances, the use of specialization would mean that a plurality of judges would sit exclusively in criminal matters, making it potentially more difficult to allocate noncriminal business in a manner that would allow some diversity in a judge's work. Thus the likelihood that the negative effects of specialization would outweigh their positive benefits would increase. One could also expect pressure to allocate an increased volume and variety of work to subordinate judicial officers.

Ironically, Ontario, whose government endorsed the principle of a unified one-level trial court for all matters, makes widespread use of subordinate judicial officers. And while current government policy calls for the phasing out of masters in civil cases, the proposed Phase Two unification would maintain the more numerous justices of the peace who sit on matters under the federal Criminal Code and Provincial Offences Act.

The maintenance of JPs may reflect the dependence of the Ontario justice system on those officials. Table 8-5 summarizes the total number of justices of the peace in Ontario as of February 1991. Estimating the number of "full-time equivalent" sitting JPs from these figures is more difficult. The 92 full-time salaried JPs with A and A-Expanded directions all preside full time hearing cases. The 176 part-time JPs at the same level include a number who sit virtually full time.

One way to develop a full-time equivalent figure would be to calculate the number of sitting hours of JPs. Those figures are available from the Ontario Ministry of the Attorney General. A computer printout covering the period from April 1989 to March 1990 shows the gross sitting hours of justices of the peace in criminal matters was 24,518, compared with 99,359 hours for Provincial Court judges. For Provincial Offences, the gross sitting hours were 45,355 for JPs and 1,575 for Provincial Court judges. These figures show that justices of the peace account for 41 percent of the sitting hours in Provincial Court criminal matters and Provincial Offences Act matters, a substantial contribution. Furthermore, the main concern expressed about the validity of these figures is that they underestimate the sitting time of JPs, because the court hours do not include night and weekend sittings, or bail hearings conducted in police stations.

Extrapolating from Table 8-5, it would be likely that there are at least 150 full time equivalent sitting justices of the peace in Ontario. Two hundred was the maximum number estimated by the Provincial Court judge who oversees the operation of Ontario's justice of the peace system. Whatever the exact figure, it is close to the total number of Ontario Provincial Court judges sitting on criminal cases as of the previous June.

The current role of Ontario JPs in hearing provincial offences may if anything be too extensive. Justices of the peace have jurisdiction over all provincial offences, including for example environmental matters where fines have run to over $70,000. Yet these JPs are virtually all nonlawyers, they often operate under conditions which make it difficult to acquire the legal information they need, and training programs have been long in coming. Political patronage continued to play a role in the selection of justices of the peace even after Ontario's Liberal government established a review committee to screen appointments of Provincial Court judges.

There is no sign that the role of JPs will be restricted if that province establishes a unified criminal court. If anything, the already well established role of subordinate judicial officers in criminal matters (and in low-dollar civil claims) is likely to expand. Ontario therefore has a substantial job to do in improving the structure and operation of its justice of the peace system.

In summary, placing all criminal matters in a unified trial court will not swamp the courts in most provinces, but will substantially alter the current proportion of civil and criminal work. The fact that criminal work will make up such a substantial percentage will mean that the roles of subordinate judicial officers will be maintained in provinces where those officers already play an important role, and could be expanded in other provinces. Simply drawing a line between criminal and penal (i.e. provincial) offences will not be sufficient to divide the work between judges and other judicial officers, since at least some penal matters should remain with judges and some responsibilities under the Criminal Code might be assigned to nonjudges under properly defined conditions.

Critics have identified other changes that could follow from a unified criminal court. For example, summary conviction appeals would presumably be shifted, since unification would mean that a judge of the same court that heard the trial would hear the appeal. It is not correct to assume that the same court that tries a case cannot hear an appeal; this is normal practice in Australian superior courts. However, to do so would require a hearing by more than the single judge who currently sits on summary conviction appeals. A single court of appeal judge could handle those appeals, but unless that judge sat in additional locations, access to the process would be more restricted than in the past. If subordinate judicial officers heard summary conviction matters, an appeal could go to a single judge of the trial court, but this would mean a substantial expansion of the work of those judicial officers, undermining one of the principles articulated by unification advocates.

The field work in the United States found that Minnesota created an intermediate court of appeal just before the full implementation of its one-level trial court, and the shifting of appeals away from the District Courts following abolition of County and Municipal Courts were a factor in establishing the new court. Pressure to create an intermediate appellate court would surely occur in Canada's largest provinces under similar circumstances. Ontario judges and lawyers – and the Zuber Report itself – already advocate such a proposal even without trial court unification.

This chapter suggests that significant issues surrounding court delay and the current operation of our two-level criminal trial process are likely to mean that the unified criminal court will remain a viable policy option. While its value has not been demonstrated in Canada, evidence of its success can be found in the United States, both as part of a one-level trial court and a unified trial court with two classes of judges. The effectiveness of the current courts' responses to the need for more flexibility and less delay may become an increasingly important element in the debate.

Chapter Nine

Alternative Conceptions of Court Unification: The Search for Integration

The term "court unification" suggests a concept with a commonly understood definition. In reality, however, the term is used for a wide variety of reforms in different court systems. Court unification has a different meaning in the United States than it has in Canada, and still another meaning in Australia. This chapter will examine these different meanings, and search for a common theme or common understanding that links the unification movement and related organizational reforms.

The common theme that emerges will be labelled "court integration." This concept will be used to place ideas on court organization in the context of basic principles of the rule of law, and to examine current Canadian court reform efforts. In developing and applying the concept of court integration, the focus will be, as it has been in previous chapters, on what historical and contemporary evidence shows and does not show about the benefits, costs, wisdom and feasibility of past and proposed changes in trial court structure.

DIVERSE DEFINITIONS OF COURT UNIFICATION

In Canada, court unification has been synonymous with trial court unification – the creation of trial courts that combine work traditionally done by section 96 courts with work done by courts with provincially-appointed judges. Thus the term has often been used in conjunction with areas of law, for example in discussing the unified family court or the unified criminal court. The Report of Canadian Bar Association Task Force on Court Reform has now added the phrase "unified civil court" to this discourse.

The Canadian understanding of the term court unification is much more focused than its American counterpart. In the United States, unification has included a wide array of structural and administrative changes that are associated with the creation of unified court systems. These changes have involved placing overall administrative authority and responsibility for the courts of a state in a single official or body. In the 50 states, this usually means the chief justice of the court of last resort, or that court itself. It may also mean a council of judges, following the framework in the U. S. federal courts, in which the chief judges of the courts of appeal in each circuit sit along with trial judges on the Judicial Conference of the United States. Created in 1922 as the Conference of Senior Circuit Judges, the Judicial Conference is now responsible for administration of the federal court system.

Reducing the number and diversity of trial courts is part of the package of unification reforms in the United States, but so is shifting court finances from local to state authorities (already accomplished in Canadian provinces), centralizing rule making power within the judicial branch, and developing statewide administrative policies, management information systems and a court personnel system. All of these changes are recommended in the Court Organization Standards of the American Bar Association, identifying these standards collectively as the "court unification model" for American state court systems.

In this context, the reorganization of trial courts within a unified court system is often labelled court consolidation. While court consolidation proposals currently being discussed in Arizona, Virginia and North Dakota focus primarily on developing a single trial court, some consolidation efforts have taken a form that more closely resembles the reorganization of the Quebec trial courts in the 1980's. In these consolidations, the superior court remained intact, while a variety of separate limited jurisdiction trial courts were combined into a single province-wide court. In the United States, this result has been termed a unified two-level trial court, and is exemplified by the creation of the Maryland District Court, a statewide state funded trial court of limited jurisdiction that replaced a variety of local municipal and justice courts in the 1970's.

It is important to bear in mind the broader American definition of court unification, because most of the criticisms of unified courts by American commentators focus on the centralization dimension rather than the consolidation dimension. It was Geoff Gallas and David Saari who in 1976 first developed comprehensive, theory-based criticism of unified court systems, citing their insensitivity to their surrounding environment, and their failure to organize around the contingencies that affect local court operations. These criticisms were aimed not at consolidation of trial courts, but at the overemphasis on central direction, the erroneous use of a legal hierarchy as an administrative hierarchy, the rigidity of uniform statewide administrative rules, and the control rather than technical assistance orientation of state court administrative offices. The most thorough evaluation of American court unification, by Thomas Henderson and his associates, concluded that centralization reforms had more significant consequences for trial court operations than the consolidation reforms that seemed at first blush to have a more direct impact. Other research has suggested further that the two dimensions of American court unification – centralization and consolidation – operate independently of one another, so that it is possible to have a centralized court system with two or more trial courts, or a unified trial court with a fragmented administrative apparatus.

The Australian concept of court unification is even broader than the American one. A "unified court structure" in Australia refers to a common court system in the country as a whole, developed through commonwealth-state negotiations and perhaps even a constitutional amendment. James Crawford wrote about it in his 1982 text, invoking at length the words of Australia's foremost chief justice:

One major change which has been much discussed but which must be regarded as more improbable ...is a unified system of Australian courts. The argument was put by Sir Owen Dixon in 1935:

> [I]t would appear natural to endeavour to establish the Courts of justice as independent organs which were neither Commonwealth nor state. The basis of the system is the supremacy of the law. The Courts administering the law should all derive an independent existence and authority from the Constitution. Some practical difficulties would occur in carrying such a principle beyond the superior Courts, but it is not easy to see why the entire system of superior Courts should not have been organized and directed under the Constitution to administer the total content of the law. No doubt some financial provisions would be required for levying upon the various Governments contributions to the cost of administering justice. To make judicial appointments and deal with some other matters, it would have been necessary to create a joint committee. But it would not have been beyond the wit of man to devise machinery which would have placed the Courts, so to speak, upon neutral territory where they administered the whole law irrespective of its source. [Crawford, IV, pp. 274-75, quoting (1935), 51 LQR 590 at 607.]

When Dixon referred to a unified court system over half a century ago, the term was unknown in Canada and little known in the United States. Furthermore, its meaning in the U.S. was limited to particular jurisdictions; no American reformer conceived of a court system in which state and federal courts shared the same administrative structure.

At the time Dixon wrote, he was focusing largely on interstate differences in the law. It was not until 40 years later that Australia created a Federal Court, as well as a national, commonwealth-administered Family Court. In this setting, interstate as well as commonwealth-state conflicts have become important.

A recent Australian innovation reflects the long time concern with unification, and again has no counterpart in Canada or the United States. The recent commonwealth "crossvesting" statute vests broad concurrent jurisdiction in courts at both the state and the commonwealth level, and then authorizes judges in those courts to transfer all claims arising from the same dispute so that they can be litigated in a single court. In this approach, court structure remains unchanged and judges remain within their respective courts, but individual cases can be shifted. It is not difficult to visualize the opposition this measure would have aroused if federal legislators in either Canada or the United States had considered it, let alone passed it.

THE UNDERLYING THEME OF COURT UNIFICATION

What these diverse approaches to court unification share is a shift away from statutory and even constitutional divisions among courts and judges, and an increase in the discretion of judges and court officials to determine the location and responsibilities of the judiciary. Boundaries between courts may simply be abolished, as in Minnesota, or made more permeable, so that work can be shifted among courts as in Australia, or judges can be moved from the courts to which they were appointed or elected to courts where their skills are needed, as in centrally-administered state court systems in the United States.

Even in England, where no structural reform in this century has been identified by the term unification, the most recent organizational changes have moved in the same direction. The creation of the Crown Court represented a type of trial court consolidation through which permanent and temporary judges of various courts become members of a single superior criminal court. Similarly, the expansion and modernization of the Lord Chancellor's Department has promoted centralization on the American model, so that the courts are subject to a unified central administration with the authority to shift judges between courts and determine the types of cases on which those judges can sit.

Perhaps the most useful term for the common elements of these reforms was the one used half a century ago by American federal appellate judge and court reformer John J. Parker: court integration. Parker stressed not simply the formal elements of court unification, but the need to integrate or bring together diverse courts and judges in order to emphasize their common commitment to the judiciary as an institution. His vision of court integration did not focus exclusively on judges of a single court; he sought the integration of state and federal judges, for example, without any notion of the merger of state and federal courts. He promoted integration by means other than jurisdictional unification, for example through the annual circuit judicial conferences that brought federal judges from multi-state circuits to one place to discuss common problems and assess developments in the law. And court integration did not isolate the judges, but extended to court officials and the practicing bar, who were also invited to the earliest circuit judicial conferences.

Integrating the court system is thus a broader concept than unifying the formal court structure. It is compatible with structural unification, where confidence in that concept has taken root and developed. But it goes beyond the notion of a trial court or court system that is unified in form, and includes a wide variety of initiatives to build mutual respect among judges and judicial officers, and to mobilize the joint commitment of all elements of the court system to improve its operations and effectiveness. These initiatives would be valuable in jurisdictions without unified trial courts, and in those with unified trial courts. They presuppose neither support for nor opposition to trial court unification.

UNIFICATION'S ROOTS IN THEORIES OF THE RULE OF LAW

Ultimately, the legitimacy of both unification and integration rests upon the relationship of courts to the modern principle of the rule of law. Those familiar with the English legal system stress the principle of judicial independence, articulated in the Act of Settlement of 1701, as the key to the judiciary's ability to uphold the rule of law. Without a necessary degree of judicial independence, the public cannot be assured that the courts will articulate and uphold legal standards free from the pressures and biases of governments. But the parallel principle of court organization, articulated in the French Decree on Judicial Organization in 1790, requires that the courts themselves not be captives of any particular estate or locality. Otherwise, they would not be organized consistently with the principle of equality before the law enunciated in the Declaration of the Rights of Man and Citizen. In short, they must be unified so that they uphold the authority of the law rather than any particular ruler or special interest.

Thus court unification is not an American concept or an English concept or a common law concept, but one rooted in the liberal theory that remains the basis of modern European political institutions. This can be seen when one realizes that the unification of the English superior courts in the 1870's was paralleled by court unification statutes in Germany in 1877, Hungary in 1869, and Russia in 1864. All were aimed, as Hungarian scholar Attila Racz has written in his 1980 treatise, Courts and Tribunals, "at reducing the great number of courts and concentrating jurisdiction within the competence of ordinary courts." [Racz, V., p. 41]

The link between concepts of a unified court system and modern theories of the rule of law can also be seen in the historical and sociological jurisprudence of the nineteenth and twentieth centuries. When Sir Henry Maine wrote over 130 years ago in Ancient Law that the inexorable movement of all legal systems was from status to contract, or when Roberto Unger in his 1976 book Law in Modern Society traced legal development from traditional or customary law to bureaucratic or regulatory law to the stage he terms "the legal order," or when Philippe Nonet and Philip Selznick distinguish repressive law from autonomous law, they are all discussing the emergence of the same phenomenon: a legal system which is beholden neither to ascriptive social standards nor to the political demands of the rulers of the day, but to independently determined and principled legal rules.

Courts play a critical role in achieving the legal order that these theorists saw emerging in western society. To do so, courts have to be organized to promote the kind of impartiality and autonomy that would ensure the supremacy of law. In Racz's use of the term, these courts had to be unified. They could not be subservient to a feudal lord, or to a ruler searching for order and stability to the exclusion of rights and liberties.

In this sense of the term unification, the most important reform in Canadian court organization was the conversion of local magistrate's courts into professional province-wide Provincial Courts. To the extent that the earlier courts were linked to local law enforcement agencies rather than integrated into a provincewide judicial system, and to the extent that magistrates were dependent on governments for their tenure and their understanding of the law, they reflected an earlier stage of legal evolution. The emergence and continued development of Provincial Courts therefore represents an important step toward a "legal order."

At the same time, however, once a degree of autonomy has been achieved that reinforces the legal order, a sufficient degree of formal unification may have been achieved to satisfy Racz's criteria. Court unification by this definition does not necessarily require only one level of trial court. If two or three or even four levels of trial courts have achieved sufficient competence and autonomy to ensure that the rule of law is preserved and enhanced, they can function as legitimate elements of the legal order. If differences, for example, in physical facilities or judicial salaries or public perceptions of competence become so great as to undermine the legitimacy of any of the courts, then the rule of law may be at risk. Conversely, a one-level trial court may lack attributes of autonomy and competence if it becomes too fragmented in practice (too closely linked to local custom or to government officials) to maintain its impartiality and independence.

COURT INTEGRATION AND THE LEGAL ORDER

In this analysis, the concept of court integration focuses court reform on developing the court system's ability to perform its functions within a legal order. It emphasizes increased linkages between courts, and among the discrete units within courts. It stresses the common purposes of courts with different day-to-day functions.

An illustration of an integrative policy that has been followed by provincial governments across Canada for as many as two decades is the construction of courthouses that reflect the independence of all courts. Courts have gradually been moved out of police stations—where the conflict of roles was most easily visible. Courthouses have been built or renovated to allow many levels of court to work in the same building, even in cities as large as Montreal, Winnipeg or Ottawa.

Current efforts and new proposals to promote court integration have two complementary purposes. One purpose focuses on flexibility and responsiveness as means to promote efficiency, reduce delay and ensure that justice is accessible and high in quality. The second builds linkages among judges and court participants that strengthen the identity, integrity and independence of the judiciary.

For example, the emphasis on developing and maintaining breadth and depth of judicial assignments should contribute to both purposes. Using specialized expertise promotes quality only when it allows for professional and personal growth and development. Flexibility and sense of commitment could be promoted by appropriate increases in the breadth of assignments. These could include shifts between trial courts and appeal courts, between superior courts and Provincial Courts, and even between one province and another.

All three American states in which field work was conducted consistently reported the administrative benefits of flexibility. These courts could deal with immediate short-term needs in urban and rural centres to an extent that we cannot yet provide in Canada. Even unified trial courts with two levels of judge reported that high-volume cases are shifted as needed to a judge who becomes available when a longer case collapses.

The three Canadian provinces in which field work was conducted demonstrated gains in flexibility in their superior courts following merger, but showed less flexibility in the linkages between divisions of the superior court in the two provinces which have unified family courts. These findings suggest the need to integrate more effectively the judges in the two Queen's Bench divisions.

In this discussion, the term flexibility has been used in a rather narrow and traditional way to refer to the ability and the practice of assigning judges to cases or terms or locations. In current management theory, flexibility also involves a broader concern with the ability of an organization to respond to changes in its environment. To what extent does a trial court have the information necessary to respond to the changing volume and variety of cases? To what extent do courts which handle different stages of a process (e.g. preliminary inquiries and jury trials in criminal cases) work together to smooth the flow of cases, so that neither the courts' time nor the parties' time is wasted, and the work is completed more expeditiously? To what extent can joint efforts of the bench, bar and court administrators help develop and promote useful changes in court procedure?

In one sense, court integration means a broader view of the traditional concept of collegiality. To the extent that collegiality breeds an exclusiveness by bringing members of one court together and excluding the members of another court, it needs to be broadened. To the extent that collegiality is reflected in the legal work of a court but not in its managerial work, it also needs to be expanded.

One of the greatest challenges that unified trial courts pose for the judiciary is their sheer size. How do chief justices administer increasingly large courts? Even New Brunswick's superior court would grow to 47 trial judges following a unified criminal court. A unified trial court in Alberta would swell to some 180 judges, Ontario to well over 400. We have not yet devoted the necessary attention to how these courts would be administered. Even if the judiciary retains its more restricted role in administration, chief justices would have responsibilities of increasing complexity and difficulty. Unless we consider new techniques and models for performing administrative roles, courts that are unified in theory could wind up being administered in a formal, hierarchical, divide-and-conquer style that would undermine the purposes that led reformers to seek unification in the first place.

The relatively small size of our existing superior courts, coupled with the relatively restricted roles of chief justices in administration, have limited the development of administrative processes necessary for larger courts. But existing processes are not likely to be sufficient for the future. Consultation that could be done quickly and informally in a hallway or coffee lounge is no longer feasible. Effective practice directions that build on a thorough understanding of operational problems may have difficulty working their way up a longer administrative hierarchy. Short cuts to delegating work may lead to subject matter divisions which become too rigid as division heads compete for resources, because inadequate consideration has been given to coordinating mechanisms that bring people together to devise effective solutions.

A unified trial court will need to mobilize collegiality in new ways so that a larger institution can be effectively administered. At the same time, trial courts that maintain the existing two-level system will also need to consider how collegial administrative processes can cut across the two trial courts to promote court integration and allow existing court structures to operate effectively.

In summary, growth in the size of courts creates new challenges for their effective integration. If increasingly large courts give way to centrifugal forces, they will lose the coherence necessary to support the legal order. But these forces cannot be resisted by command. They are resisted not simply by strengthening the centre, but by energizing all parts of the institution. Only then can the pressures be dealt with by the cumulative rather than contradictory efforts of participants throughout the courts.

RESPONSIVE LAW AND RESPONSIVE COURTS

The issues identified in the last section go beyond the establishment of the judiciary as an impartial and independent component of the legal order. We are moving from a focus on autonomy – making sure the courts operate as separate institutions – to a focus on effectiveness – making sure the courts do their distinctive work well.

Nonet and Selznick address this shift in their slim theoretical volume, Law and Society in Transition. They identify the emergence of the rule of law in the shift from repressive to autonomous law. They then identify a third stage, responsive law, which moves beyond the second stage of autonomous law to demand effectiveness as well as independence.

Canada's courts and legal system have reached this third stage. Independent justice is expected as a given, an assumption of a democratic legal order. Effective justice, through responsive law and responsive court administration, is still problematic; essential, but not yet achieved. As a result, judiciaries, governments and the public are increasingly turning their attention to issues that address effectiveness and responsiveness, from the delivery of justice to native people in remote areas to the reorganization of criminal case scheduling in urban courts, from a process to handle family violence cases to a framework for ensuring that the courts are accessible to middle and working class litigants. Educational programs for judges have moved beyond substantive and procedural law to address topics as diverse as gender bias and computer skills.

Court structure will remain an important consideration when these issues are discussed and policies devised and implemented. But it will no longer be an end in itself. Simplicity and coherence will not be defined by an organization chart in a central office, but by the public's ability to comprehend and use the institution.

In the process, structural options will diversify, but the range of real choices will grow narrower. For example, discussion of the unified criminal court in light of American unification models and Canadian changes in court structure suggests that a one-level trial court is not the only option for change, or the only likely result. Three options for change can be identified from among a larger variety of alternative futures:

- A one-level trial court as in Minnesota, and as has been under active consideration in New Brunswick.

- A unified trial court with two levels of judges, as in Illinois and South Dakota, and as is likely to emerge if Ontario indeed moves to Phase 2 of court reform.

- Two separate but increasingly integrated trial courts. This alternative has the appearance of the existing structure, but includes a wide variety of steps designed to enhance the capacity of these courts to do their work. Manitoba's new administrative initiatives mark the beginning of one such approach. The work of local judges and court officials who encourage communication across formal court boundaries, and smooth the flow of cases in situations that occur every day, are providing a foundation for this alternative.

In fact, all three of these models of the future illustrate approaches to court integration, and efforts to increase responsiveness. To the extent that they address current public concerns about the effective administration of justice, and do so in a manner that reinforces the principle of the rule of law, they will promote respect for the courts as an institution, both from those within the courts and those outside.

Chapters One and Two argued that the changes in court structure in Canada over the past 25 years were more extensive than those in the previous 100 years. While this suggests that the pace of change is quickening, it does not mean that widespread further changes in trial court structure are imminent. Changes in the next decade are likely to stress improvements in performance that will require new practices within courts, and new and expanded relations between courts. At the same time, individual provinces may realize that increased responsiveness in family law matters has occurred when those matters have been brought within a single unified court. And some provinces may reason that the same results will occur with a unified criminal court, while others may prefer to watch what happens in the first province(s) to implement this change.

Whatever the extent of changes in structures and practices, we are likely to see changes in the courts as institutions. Along with these will be changes in the way judges see their work and define their responsibilities. The traditional role of deciding between contending legal arguments put forward in superior court is likely to give way as judges become sensitive to a more diverse assortment of choice problems and nonlegal issues. Answers will not come as easily nor be as certain, because the categories of the past no longer fit the tasks of the present. In this environment, steps that integrate the judiciary, that promote communication and joint problem-solving, may prove essential to preserving the integrity of the institution as its practices and perhaps also its structure are transformed.

Annotated Bibliography

I. CANADIAN SOURCES

A. General

Alford, David G. et al., Some Statistics on the Preliminary Inquiry in Canada (Ottawa: Department of Justice Canada [Policy, Programs and Research Branch; Research and Statistics Section], 1984).

Canadian Bar Association Court Reform Task Force, Consultation Materials, February 1991, 16 pp. typescript.

Canadian Bar Association Task Force, Court Reform in Canada (Ottawa: Canadian Bar Association, Aug. 1991). The 180-page final report of the task force chaired by Justice Peter Seaton.

Cawsey, Allan, "Toward a Rationalization of Criminal Procedure," (1979) Provincial Judges Journal. The author, now a Queen's Bench Justice in Alberta, was then Chief Judge of the Alberta Provincial Court and chaired the Committee on Court Structures of the Canadian Association of Provincial Court Judges. He presents a five-point criticism of the existing structure of courts of criminal jurisdiction.

Cromwell, T. A., Toward A Unified Criminal Court? Discussion paper prepared for the Court Reform Task Force of the Canadian Bar Association, Feb. 1991.

Giard, Monique and Marcel Proulx, Pour comprendre l'appareil judiciaire québécois (Sillery, Quebec: Presses de l'Universite du Quebec, 1985). See especially ch. 2.

Girard, Philip, "Married Women's Property, Chancery Abolition, and Insolvency Law: Law Reform in Nova Scotia, 1820-1867," in Philip Girard and Jim Phillips, eds., Essays in the History of Canadian Law, Volume III: Nova Scotia (Toronto: The Osgoode Society, 1990), pp. 80-127. See especially the section on "Fusion of the Courts of Law and Equity" beginning on p. 106, which discusses the successful effort to abolish the Court of Chancery.

Gouvernement du Québec, Ministère de la Justice, Justice Today (Québec : l'Éditeur officiel du Québec, c. 1975). This report, the Quebec White Paper, begins with a 30-page Foreward by Jérome Choquette, Q.C., then Minister of Justice. Chapter II, "Reorganization of Quebec Courts," includes at p. 100 of the English text, a diagram of the proposed overall structure of the Quebec judicial system that is consistent with the form reorganization took over a decade later.

Law Reform Commission of Canada, Working Paper No. 1: The Family Court (Ottawa: Law Reform Commission of Canada, January 1974). The report's first recommendation is the creation of a unified family court.

Law Reform Commission of Canada, Working Paper 59: Toward a Unified Criminal Court (Ottawa: Law Reform Commission of Canada, 1989). The controversial report recommending elimination of two levels of trial courts for criminal matters.

Lyon, Noel, "Provincial Courts and the Administration of Justice," (1979) Provincial Judges Journal. The Queen's law professor's formulation of a reorganized court system is usually cited by Provincial Court judges who supported the development of a three-division trial court of general jurisdiction. Note however that Lyon advocated the retention of a central trial court for complex cases, closer to the Zuber Report recommendations a decade later than any other reform proposals.

McCormick, Peter and Ian Greene, Judges and Judging: Inside the Canadian Judicial System (Toronto: James Lorimer and Co., 1990). A new and useful introduction to the Canadian courts.

McDonald, David C. (Justice, Alberta Court of Queen's Bench), "Comments on Proposals for a Single Trial Court in the Canadian Provinces," remarks for delivery at Judges' Day at the Canadian Bar Association Annual Meeting, London, England, Sept. 26, 1990, 10 pp. The best known and clearest summary statement of the arguments against a unified criminal court.

Millar, Perry S. and Carl Baar, Judicial Administration in Canada (Montreal and Kingston: McGill-Queens University Press, 1981). Chapter 4 includes a summary of court structural issues.

Regina v. Askov et al., [1990] 2 S.C.R. 1199, (1990), 59 C.C.C. (3d) 449.

Report of the Justice Reform Committee: Access to Justice (British Columbia, 1988). The Hughes Report, a wide ranging study that included discussion of court structure.

Report of the Task Force on Nova Scotia Court Structure (Halifax, 1991). The Task Force was chaired by William H. Charles.

Royal Commission on the Donald Marshall, Jr., Prosecution (Halifax, 1989). The Commission was chaired by Chief Justice T. A. Hickman.

Russell, Peter H., The Judiciary in Canada: The Third Branch of Government (Toronto: McGraw-Hill Ryerson, 1987).

Toward Unity: Criminal Justice and Corrections, Report of the Canadian Committee on Corrections (Ottawa: Queen's Printer, March 31, 1969). The Committee, chaired by Mr. Justice Roger Ouimet, conducted a comprehensive study of the criminal process; chapter 9 focuses on the criminal court.

B. Alberta

Alberta Board of Review, Provincial Courts, Report No. 2, Administration of Justice in the Provincial Courts of Alberta, Justice W. J. C. Kirby, Chair (1975).

Alberta Court Calendar, January 1, 1991 to June 30, 1991 (Edmonton: Attorney General of Alberta). This semiannual publication provides complete information on sittings and membership of Alberta's courts.

Closing Ceremony of the District Court of Alberta, held in the Law Courts, Edmonton, June 29, 1979. Transcript prepared by Queen's Bench court reporters.

Decore, John N., "The District Court of Alberta," Alberta Law Review 23-24 (1980).

Morrow, W. G., "Some Legal Legends," Alberta Law Review 15-22 (1980). Anecdotes about Alberta judges.

Patterson, H. S., "The District Court of Southern Alberta," Alberta Law Review 25-29 (1980).

Proceedings at the Final Sittings of the District Court of Alberta, Judicial District of Calgary, June 29, 1979. Transcript prepared by Calgary court reporters.

Purvis, Stuart S., "Family Courts: A Plan for Alberta," 10 Canadian Bar Journal [sic] 374-88 (1967).

Purvis, Stuart S., "Rationale for a Family Court," (1971) 1 Reports of Family Law 402-12.

Sinclair, William R. (Justice, Alberta Court of Queen's Bench), "Structural Reform: The Creation of Provincial Supreme Courts: A View from Alberta," 31 Criminal Law Quarterly 43-54 (1989). Focuses on relationship between trial and appeal courts, and provides useful discussion of Alberta's adaptation of the English practice of having trial judges sit on sentence appeal panels.

Sissons, Jack, Judge of the Far North (Toronto: McClelland and Stewart, 1968). Reminisences of the first justice of the Supreme Court of the Northwest Territories, including discussion of his tenure as a District Court judge in Lethbridge, Alberta.

Smith, S. Bruce (Justice of Appeal, Alberta), "The Superior Courts of Alberta," Alberta Law Review 8-14 (1980). A historical review of the judges who served on the Trial and Appellate Divisions of the Supreme Court of Alberta, the predecessor courts of the merged trial court and separate appeal court.

Spevakow, R. B. (Judge, Provincial Court of Alberta), "Small Claims for Alberta: Some Recommendations," 17 Alberta Law Review 244-60 (1979).

Task Force on the Criminal Justice System and Its Impact on the Indian and Metis People of Alberta, Justice on Trial (Edmonton, March 1991). The three-volume report of the seven-member task force chaired by Justice R. A. Cawsey of the Alberta Court of Queen's Bench. Volume One is the main report, Volume Two is a 43-page summary.

C. Manitoba

Carr, Robert, A Report on the State of Family Law in Manitoba: Recommendations for Change (Winnipeg, May 1982). A comprehensive report on family law prepared for Manitoba Attorney General Roland Penner. Chapter VII was on "Jurisdiction of the Courts" and concluded by recommending a unified family court.

Conner, Arnold J. (Judge, Manitoba Provincial Judges Court [Criminal Division]), "Images of the Court," Provincial Judges Journal (1979). A criticism of the quality of adjudication in his court, following consultation with users of the court.

Family Law Services Outside of Winnipeg: Report of the Committee (May 1988). Fourteen-page report of the committee chaired by Marvin Bruce, Assistant Deputy Minister of Court Services.

Hewak, Chief Justice B., "Annual Report of the Chief Justice of the Court of Queen's Bench of Manitoba, Year Ending December 31, 1986," 18 Headnotes and Footnotes no. 2 (Feb. 1987), 10-13.

Hewak, Chief Justice B., "Annual Report of the Chief Justice of the Court of Queen's Bench of Manitoba, Year Ending December 31, 1987," 19 Headnotes and Footnotes no. 5 (May 1988), 3-7.

Hewak, Chief Justice B., "Annual Report of the Chief Justice of the Court of Queen's Bench of Manitoba, Year Ending December 31, 1989," 22 Headnotes and Footnotes no. 6 (June 1990), 14-17.

"In Brief: Courts Merge in Manitoba," Provincial Judges Journal 15-16 (1985).

Manitoba Law Reform Commission, Report on the Independence of Provincial Judges (Report #72, June 28, 1989). An excellent current survey of issues surrounding appointment, remuneration, discipline, evaluation and immunity.

Manitoba Law Reform Commission, Report on the Structure of the Courts, Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba (1982). The report immediately preceded merger in that province.

Report of the Aboriginal Justice Inquiry of Manitoba (Winnipeg, Sept. 1991). The two-volume report of the inquiry headed by Justice Hamilton and Judge Sinclair included a recommendation for a single trial court for the entire province, the Trial Court of Alberta. [Released too late for integration of its recommendations into the text of this study.]

Stubbs, Roy St. George, "Mr. Justice Dysart," 32 Canadian Bar Review 161-78 (Feb. 1954). A review of the career of a man who spent 26 years on the Manitoba Court of Queen's Bench.

Ursel, E. Jane, "Family Violence Court Research Project Statistics Submitted to Winnipeg Service Providers, May 1991." Provides initial evaluation data on the pilot family violence court operating within the Provincial Court in Winnipeg. Professor Ursel of the University of Manitoba Department of Sociology directed the evaluation.

D. New Brunswick

A Report Relating to the Reorganization of the Courts of New Brunswick and Recommendations Concerning a Proposed Merger of Courts, May 17, 1978. The report of a three-member committee chaired by Horace A. Hanson, Q.C.

Bladon, Geoffrey L., "'Neither Out Far, Nor In Deep': A Comment," (1988) 37 University of New Brunswick Law Journal 111-15. Response to Cromwell's presentation criticizing Ontario's Zuber Report. Includes discussion of problems in creating a "people's court" with simplified procedures for an increasingly wide range of civil cases.

McEvoy v. Attorney General of New Brunswick and Attorney General of Canada [1983] 1 S.C.R. 704, 148 D.L.R. (3d) 25, 4 C.C.C. (3d) 289 (Supreme Court of Canada), reversing Reference Re Establishment of a Unified Criminal Court of New Brunswick (1981), 62 C.C.C. (2d) 165 (New Brunswick Court of Appeal).

Stanley, Della M. M., Louis Robichaud: A Decade of Power (Halifax: Nimbus Publishing, 1984). Chapter XII, "Equal Opportunity," cites judicial reform in the context of Robichaud's program of the 1960's (pp. 154-55).

"The Organizational Structure of the Department of Justice in Relation to the Office of Attorney-General in New Brunswick," (1988) 37 University of New Brunswick Law Journal 198-[219]. Edited text of a 1987 submission to a New Brunswick legislative committee by the provincial Attorney General; drafted by Mary E. Hatherly of the UNB Law Faculty. Focuses on departmental organization, not court structure, and includes a useful current survey of how government departments administer justice functions.

E. Ontario

Baar, Carl, "The Zuber Report: The Decline and Fall of Court Reform in Ontario," (1988) 8 Windsor Yearbook of Access to Justice 105-49. A general overview of the Zuber Report. The structural reform proposals are placed in a comparative context at pp. 121-31, and alternative proposals are made at pp. 131-39 in light of the response to Zuber.

Court Reform Task Force, Ontario Ministry of the Attorney General, "Court Reform: Phase II – Unified Criminal Court and Appeal Court Reform – A Discussion Paper," June 1990. Part I presents the Ontario Government's case for a unified criminal court. Part II deals in part with how summary conviction appeals might be dealt with once there is a unified criminal court.

Kinnear, Helen (County Court Judge for Haldimand [Ont.]), "The County Judge in Ontario," 32 Canadian Bar Review 21-43, 127-60 (Jan.-Feb. 1954).

Ontario Law Reform Commission, Report on Administration of Ontario Courts, 3 vols. (1973). In Part I, Chap. 3 dealt with the proposal to merge the High Court and County Court, rejecting it over one dissent, and Chap. 13 is on restructuring of the family courts. Part II, Chap. 1, deals with the Provincial Court (Criminal Division). Part III, Chap. 12, is on small claims courts.

Ontario Ministry of the Attorney General, White Paper on Courts Administration (Oct. 1976). The 28-page report was the first to set forth an administrative structure responsible to a provincial council of judges.

Royal Commission Inquiry into Civil Rights (Toronto, 1968). The famous report of Justice James C. McRuer. Volume II focuses on the Provincial Court.

Scott, Ian, "The Concept of a Single Court," paper presented to Civil Litigation Seminar, Mont Ste. Marie, Quebec, Nov. 1989. A comprehensive statement by Scott as Attorney General of Ontario, spelling out the principles underlying his government's court reform initiatives. See especially pp. 73-81, "The Challenges of Phase II."

Silk, Eric H., Q.C. (Assistant Deputy Attorney General of Ontario), Report to Hon. A. Kelso Roberts, Q.C., M.P.P., Attorney General of Ontario, of Certain Studies of the Jurisdiction of County and District Courts and Related Matters (mimeographed, 144 pp., 1961). This substantial but long-forgotten report—it is never mentioned by Zuber—was apparently stimulated by a January 9, 1961, opening of court address by John J. Robinette, then Treasurer of the Law Society of Upper Canada, calling for an increase in County Court jurisdiction as a way of reducing the workload of the High Court of Justice. Silk recommended an increase in civil jurisdiction from $4,000. to $10,000., along with a system of "interchange" so that judges could be shifted from county to county as workload required.

Zuber, The Honourable T. G., Report of the Ontario Courts Inquiry, 1987. Includes a comprehensive history of Ontario court structure and a detailed outline of Justice Zuber's controversial model for the provincial court system, a four-level court system featuring two courts of appeal and two trial courts.

II. UNITED STATES SOURCES

A. General

Alschuler, Albert W., "Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases," 99 Harvard Law Review 1808-59 (June 1986). Argues not for a two-level court structure but a two-step procedural sequence informed by West German civil procedure.

American Bar Association, Standards Relating to Court Organization (Chicago: ABA, 1990). Replaces 1974 standards.

Baar, Carl, "Inter-Court Relations in Comparative Perspective: Toward an Ecology of Trial Courts," 12 Justice System Journal 19-35 (Spr. 1987).

Baar, Carl, Separate but Subservient: Court Budgeting in the American States (Lexington, Mass.: D.C. Heath, 1975).

Baar, Carl, "The Scope and Limits of Court Reform," 5 Justice System Journal 274-90 (Spring 1980).

Baar, Carl and Thomas Henderson, "Alternative Models for Organization of State Court Systems," 10 Policy Studies Journal 756-67 (June 1982); reprinted in Philip L. Dubois, ed., The Analysis of Judicial Reform (Lexington, Mass.: D.C. Heath, 1982).

Berkson, Larry, "Unified Court Systems: A Ranking of the States," 3 Justice System Journal 264 (1978).

Berkson, Larry C. and Susan Carbon, Court Unification: History, Politics and Implementation (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, 1978).

Conference of State Court Administrators, State Court Organization 1987 (Williamsburg, Va.: National Center for State Courts, 1988). A comprehensive compendium of information on how state court systems are organized in the United States. Includes court structure charts and numbers of judges in each state.

Flango, Victor E. and David B. Rottman, "Measuring Trial Court Consolidation," unpublished paper (Williamsburg, Va.: National Center for State Courts, April 1991). Updates Berkson's rankings on the dimension of trial court consolidation (what we have termed unification).

Gallas, Geoff, "The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach," 2 Justice System Journal 35-55 (Spring 1976).

Goerdt, John, Examining Court Delay (Williamsburg, Va.: National Center for State Courts, 1989).

Henderson, Thomas A. et al., The Significance of Judicial Structure: The Effect of Unification on Trial Court Operations (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, March 1984). The 187-page final report of the first effort to evaluate court unification in the United States on a multi-state basis. Note that "unification" refers not only to trial court unification (termed consolidation in the report), but also to centralization of administrative services.

Henderson, Thomas A., Cornelius Kerwin and Hildy Saizow, Structuring Justice: The Implications of Court Unification Reforms (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, March 1984). A 104-page "Policy Summary" based upon the findings of the larger study of court structure in five state court systems.

Kerwin, Cornelius M., Thomas A. Henderson and Carl Baar, "Adjudicatory Processes and the Organization of Trial Courts," 70 Judicature 99-106 (Aug./Sept. 1986). Distinguishes between procedural, decisional and diagnostic adjudication as the three different ways in which courts deal with their cases.

Lawson, Harry O. "State Court System Unification," 31 The American University Law Review 273 (1982).

Mahoney, Barry, Changing Times in Trial Courts (Williamsburg, Va.: National Center for State Courts, 1988).

Merry, Sally Engle, Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans (Chicago: University of Chicago Press, 1990).

Provine, Doris Marie, Judging Credentials: Nonlawyer Judges and the Politics of Professionalism (Chicago: University of Chicago Press, 1986).

Ruhnka, John C. and Steven Weller, Small Claims Courts: A National Examination (Williamsburg, Va.: National Center for State Courts, 1978).

Saari, David J., "Modern Court Management: Trends in Court Organization Concepts – 1976," 2 Justice System Journal 19-33 (Spring 1976).

State Court Administrative Systems: Perspectives and Relationships (Denver: Institute for Court Management, Jan. 1975).

State Court Caseload Statistics: Annual Report 1989 (Williamsburg, Va.: National Center for State Courts, Feb. 1991). A joint effort of the Conference of State Court Administrators, the State Justice Institute, and the National Center. For present purposes, Part IV (pp. 167-223) is especially important because it includes state court structure charts for 1989, updating the 1987 charts. This is the Center's most substantial effort to develop comparative caseload statistics that are valid across diverse American jurisdictions. A brief Guidebook was published to accompany the report.

Survey of Judicial Salaries (Williamsburg, Virginia: National Center for State Courts, Jan. 1991). Published twice annually, this survey is useful not only as a continual update of salaries, but also as a directory of the variety and titles of all trial and appeal judges in the U.S. and its possessions.

B. Federal Courts

Lawrence Baum, "Specializing the Federal Courts: Neutral Reforms or Efforts to Shape Judicial Policy?" 74 Judicature 217-24 (Dec.-Jan. 1991). A provocative analysis of U.S. legislative efforts to create specialized courts. Baum contends that the policy goals of government and private interests have been more important in the process than the "neutral virtues" of gaining expert judges.

Brookings Task Force on Civil Justice Reform, Justice for All: Reducing Costs and Delay in Civil Litigation (Washington, D.C.: Brookings Institution, 1989). The main focus of this study is not structure but issues related to caseflow management. However, the report has had substantial impact when it became the basis for the so-called Biden Bill passed by the U.S. Congress, mandating federal court action to reduce the elapsed time in civil cases.

Flango, Victor Eugene, "Attorneys' Perspectives on Choice of Forum in Diversity Cases," draft project report (Williamsburg, Va.: National Center for State Courts, July 10, 1991).

Flango, Victor Eugene and Craig Boersema, "Are Federal Diversity Cases More Burdensome than State Cases?" 14 State Court Journal 4-14 (Summer 1990).

Flango, Victor E. and Craig Boersema, "Changes in Federal Diversity Jurisdiction: Effects on State Court Caseloads," 15 University of Dayton Law Review 405-55 (1990).

Heydebrand, Wolf and Carroll Seron, Rationalizing Justice: The Political Economy of the Federal District Courts (Albany, N.Y.: State University of New York Press, 1990). Two sociologists with extensive research experience in the federal courts have written a comprehensive study of the organizational development of the federal courts. A typology of six models of justice – traditional, professional, bureaucratic, technocratic, market and democratic – is used to examine federal court reforms over the past century.

Archibald King, "The Proposed Abolition of U. S. Commissioners," 37 Journal of the American Judicature Society 116-19 (Dec. 1953). A response to Lederle (below).

Arthur F. Lederle, "Abolish Unnecessary Court Appendages to Improve the Administration of Justice," 36 Journal of the American Judicature Society 102-05 (Dec. 1952). The author, then Chief Judge of the United States District Court for the Eastern District of Michigan (the Detroit federal trial court), argued for the abolition of the United States Commissioner system. Commissioners were subordinate judicial officers; Lederle called them "the police court appendage of the Federal Court." Commissioners were abolished in the late 1960's – only to be replaced by more prestigious U.S. Magistrates, recently renamed Magistrate Judges.

Ostrom, Brian J. and Geoff Gallas, "Case Space: Do Workload Considerations Support a Shift of Cases from Federal to State Court Systems?" 14 State Court Journal 15-22 (Summer 1990).

Posner, Richard A., The Federal Courts: Crisis and Reform (Cambridge, Mass.: Harvard University Press, 1985). The prominent judge of the U.S. Court of Appeals for the Seventh Circuit examines the growth of federal court caseloads and proposes a more limited role for the federal courts.

Report of the Federal Courts Study Committee, April 2, 1990 [no publisher indicated]. The report of a "blue-ribbon panel . . . authorized by the Congress and appointed by the Chief Justice of the United States." A major study of a variety of issues, this 199-page volume covers Parts I and II of the report: an overview, and a summary of recommendations that covers ten chapters. Part III in a separate volume contains detailed analyses of selected issues.

C. Illinois

Administrative Office of the Illinois Courts, 1987 Annual Report to the Supreme Court of Illinois. A 250-page report (roughly 60% consists of tables of quantitative data) comparable to earlier reports.

Annual Report, Nineteenth Judicial Circuit, Lake County-McHenry County, Illinois, 1989 (Waukegan, 52 pp.).

Boyle, John S. (Chief Judge, Cook County Circuit Court), "Judicial Aspects of Trial Court Administration: The Quest for Effective Justice," 36 Brooklyn Law Review 342-58.

Eisendrath, Margaret M., "The Judicial Article and the Family Court," 43 Chicago Bar Record 440-44 (1962).

Hershey, Harry B. (Chief Justice, Illinois Supreme Court), "The Proposed Judicial Article," 44 Chicago Bar Record 247-50 (1962).

Lockwood, Brocton (with Harlan H. Mendenhall), Operation Greylord: Brocton Lockwood's Story (Carbondale, Ill.: Southern Illinois University Press, 1989). Lockwood describes his involvement in undercover work to obtain evidence of corruption in the Cook County (Chicago) Circuit Court's Traffic Division. At the time, he was an Associate Circuit Court Judge in a small downstate Illinois county who served as a visiting judge in Chicago. By the time of the book's publication, five years after "Operation Greylord," 15 judges had been convicted of federal crimes.

Marshall, James K., "Judicial Reform and the Master in Chancery—1962," 44 Chicago Bar Record 23-26 (1962).

"New Judicial Article Proposed to Modernize Illinois Court System," 36 Journal of the American Judicature Society 106-09 (Dec. 1952).

Nordberg, John A., "Farewell to Illinois J.P.'s – A Lesson from History," 44 Chicago Bar Record 469-78 (1963).

Pusateri, Lawrence X., "The Need to Complete Court Reform in Illinois," 48 Chicago Bar Record 108-15 (1967).

Robinson, Cyril D., "A Small Claims Division for Chicago's New Circuit Court," 44 Chicago Bar Record 420-33 (1963).

Rolewick, David F., A Short History of the Illinois Judicial Systems (Springfield and Chicago: Administrative Office of the Illinois Courts, 1976 [first printing, 1968]). A useful 47-page introduction.

Trends and Issues 90: Criminal and Juvenile Justice in Illinois (Chicago: Illinois Criminal Justice Information Authority, 1990). Includes a 55-page chapter on the courts, with current data and a special section on court financing.

D. Minnesota

Baez, Gail S. "Jury Trials in Juvenile Courts: A Prosecutor's Perspective," 50 Hennepin Lawyer 16-17 (Jan.-Feb. 1981).

Briol, Mark J. and Gregory L. Wilmes, "An Update on Arbitration and Mediation in Hennepin County," 56 Hennepin Lawyer 6-7, 20-23 (May-June 1987).

Court Consolidation Study Commission, Final Report, prepared by Janet Marshall (St. Paul: Judicial Planning Committee, Feb. 1984), 19 pp. typewritten.

Dosal, Francis E., "Court Annexed, Mandatory, Nonbinding Arbitration of Civil Cases – A National Survey of Existing Programs," 53 Hennepin Lawyer 16-18 (May-June 1984).

Finch, Frederick E., "Court Reform – Solution or Problem?" 46 Hennepin Lawyer 9-11, 29 (Sept.-Oct. 1977).

Knutson, Oscar R. (Chief Justice, Supreme Court of Minnesota), "State-Federal Relations in Minnesota," 50 Federal Rules Decisions 429-36 (1971). From the Proceedings of the Judicial Conference of the Eighth Judicial Circuit of the United States, August 26-28, 1970.

Levy, Roberta K., "Inside View," 52 Hennepin Lawyer 3, 24 (Sept.-Oct. 1982).

Minnesota Courts: Expediting Justice 1989. The annual report of the state judicial system.

Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report, 15 William Mitchell Law Review 825-948 (1989). The 120-page report and an additional 74 pages of appendices provides an excellent example of the wide range of topics covered by the gender bias task forces that have been appointed by state judicial branches in the U.S. The report covers substantive law matters in family law, domestic violence and criminal and civil justice, as well as a fascinating chapter on the "courtroom environment" that deals with the treatment of women lawyers, judges, witnesses and litigants, and the sexual harassment of court employees.

Pirsig, Maynard E., "The Proposed Amendment of the Judiciary Article of the Minnesota Constitution," 40 Minnesota Law Review 815-41 (1956).

Stuart, John M. and Philip D. Bush, "It's Time for Jury Trials in Juvenile Court," 50 Hennepin Lawyer 8-10 (March-Apr. 1981).

Tennessen, Robert J. (State Senator), "Court Reform 1977," 46 Hennepin Lawyer 6-8 (Sept.-Oct. 1977).

E. South Dakota

Benchmark 1989: Annual Report of The South Dakota Unified Judicial System (Pierre: Office of the South Dakota State Court Administrator, Jan. 1990). Comparable volumes published throughout the 1980's.

Court Study Commission, Report to the 1963 South Dakota Legislature.

Ericsson, L. F., "The President's Page," South Dakota Bar Journal 3 (March 1973).

Geary, T. C., Justices of the Peace and Police Magistrates in South Dakota: Report of a Survey (March 1971). An 82-page report prepared by a University of South Dakota Professor of Government and submitted to the State Planning and Advisory Commission on Crime.

Goehring, Keith, "The South Dakota Judicial System: Past and Present," 28 South Dakota Law Review 88-121 (Winter 1982).

Hall, Philo (Presiding Judge, Fifth Judicial Circuit Court), "The Unified Judicial System in South Dakota: A Fifth Year Report," 25 South Dakota Law Review 1-13 (Winter 1980).

Kuban, Gerald B., The Implementation of the South Dakota Unified Judicial System (Chicago: Public Administration Service, Dec. 1974). A 386-page consultants' study that focuses on the personnel and financial management framework necessary for the transition from local to state administration of the courts.

Staff Background Memorandum: Court Reform in South Dakota (Pierre: State Legislative Research Council, May 28, 1964).

F. Other United States Jurisdictions

Courts in Transition: The Report of the Commission on the Future of Viriginia's Judicial System (Richmond, Va., 1989).

District of Columbia Courts, Annual Report 1990 (Washingon, D.C., 1991). A comprehensive annual report with caseload data, available for the past 20 years of the unified D.C. Superior Court.

Report of the Task Force on Court Organization and Administration (Phoenix, Arizona: Commission on the Courts, April 1989). The Task Force was appointed in June 1988 by the Arizona Chief Justice. Chapter One of its report recommends creation of a unified trial court by restructuring the existing superior court, justice of the peace courts and municipal courts.

III. BRITISH SOURCES

Civil Justice Review, Report of the Review Body on Civil Justice (London: HMSO, 1988, Cm 394). The most recent major examination of the English trial courts.

Ford, Donald, Children, Courts and Caring: A Study of the Children and Young Persons Act, 1969 (London: Constable, 1975). Written by a longtime lay magistrate. See chapter 4, "How the Juvenile Court Works".

Ingman, Terence, The English Legal Process, 3d ed. (London: Blackstone Press, 1990). Chapters One and Two outline the "courts of normal jurisdiction" and "courts of special jurisdiction."

Lord Chancellor's Department Court Service, Annual Report 1989-90.

Lord Chancellor's Department, Judicial Statistics Annual Report 1989 (London: HMSO, July 1990, Cm 1154). The annual statistical reports are available through the government's central publications office.

Scott, Ian R., The Crown Court (1972). The first book on that court, by the University of Birmingham law professor who is England's foremost expert on court administration.

IV. AUSTRALIAN AND NEW ZEALAND SOURCES

Crawford, James, Australian Courts of Law (Melbourne: Oxford University Press, 1982). A useful survey of both the general jurisdiction courts and courts of "specialist jurisdiction."

Family Court of Australia, Report of the Working Party on the Review of the Family Court (Sydney, N.S.W.: Sept. 1990). A 482-page review of the first 15 years of Australia's nationwide unified family court. Includes a wide range of structural and operational recommendations.

Law Commission, Report No. 7: The Structure of the Courts (Wellington, New Zealand: March 1989). A comprehensive 289-page report that includes a number of references to the Ontario Courts Inquiry (the Zuber Report).

V. GENERAL BACKGROUND SOURCES

Douglas, Mary, How Institutions Think (London: Routledge & Kegan Paul, 1987). An anthropologist whose work in cultural analysis has also intersected with political science, she emphasizes both the importance of institutions and our role in shaping them.

March, James G. and Johan P. Olsen, Rediscovering Institutions: The Organizational Basis of Politics (New York: Free Press, 1989). The authors, an American and a Norwegian, are among the foremost students of political institutions. This book provides a theoretical framework for institutional reform that may be suggestive for the courts as well. Olsen is best known for his "garbage can" theory of organizational change, which argues that most reform packages lump together a wide variety of proposals that are not always consistent with one another.

Nonet, Philippe and Philip Selznick, Law and Society in Transition: Toward Responsive Law (New York: Harper Colophon Books, 1978).

Racz, Attila, Courts and Tribunals (Budapest: Akademiai Kiado, 1980). While couched in Marxist terminology as a history of the development of bourgeois courts, Racz's study is the best comparative analysis available on the unification and differentiation of courts. Included as examples of the differentiation of Western courts are proliferating administrative tribunals.

Unger, Roberto M., Law in Modern Society (New York: Free Press, 1976).

White, Graham, "Big Is Different from Little: On Taking Size Seriously in the Analysis of Canadian Governmental Institutions," 33 Canadian Public Administration 526-50 (Winter 1990). Focuses on provincial legislatures and cabinets, but develops arguments about the implications of both relative and absolute size that are worth using to evaluate the possibility of differences in impact of court structural reforms.